Office ... Court U. S.
FILED
JAN 25 1900
JAMES H. McKENNEY

No. 103 21

Off. of Darlington.

& Fraser for P. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1899.

Filed Jan. 25, 1900.

No. 103.

JOSEPHINE HOLT THROCKMORTON AND LUKE DEVLIN, PLAINTIFFS IN ERROR,

vs.

WASHINGTON D. HOLT ET AL., DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR.

J. J. DARLINGTON,
CALDERON CARLISLE,
WILLIAM G. JOHNSON,
GEORGE C. FRASER,
Counsel for Plaintiffs in Error.

LAW REPORTER PRINT.

INDEX.

	Page
THE QUESTIONS IN THIS CASE	1
The proceedings below	2
STATEMENT	4
Judge Holt's life and family	4
The persons named in the will	5
Judge Holt's relatives	11
Judge Holt's home surroundings at the time of his death	14
Immediate possession of Judge Holt's house and effects taken by caveators	15
Unlawful disturbance and destruction of Judge Holt's papers by caveators	16
Spoliators the sole source of information as to papers burned, continue in control	17
The will anonymously sent by mail to the Register.	18
Subscribing witnesses all assembled at Judge Holt's house in the month and year will bears date	19
Proceedings for probate of will	20
ASSIGNMENT OF ERRORS	22
ARGUMENT	24
The law and practice of this jurisdiction in will contests	24
This case, though extraordinary in its circumstances, is not unprecedented, and is subject to the ordinary rules of law applicable to will contests	23
THE ISSUE OF REVOCATION	57
No evidence of revocation by word of mouth	58
No evidence of revocation by a later inconsistent will	59
No evidence of an express revocation in writing	69
No evidence of revocation by burning, canceling, tearing, obliterating, or other form of destruction or defacement	69
The presumption is that the mutilation was neither done nor authorized by Judge Holt	79
No evidence of revocation, and the court should so have instructed the jury	91
The opinion of the Court of Appeals on the questions arising under the issue of revocation	97

Page

ARGUMENT—*Continued.*

THE ISSUE OF FORGERY 107

Evidence tending to show a state of mind generally inadmissible 111

Upon an issue of forgery, this evidence has been uniformly excluded by the courts in all considered cases of authority 124

The admissibility of this evidence supported solely by the decision in Hoppe *vs.* Beyers, 60 Md. 381 (1883) 148

The decision in Hoppe *vs.* Beyers is unsupported by authority 149

The decision in Hoppe *vs.* Beyers is unsound in principle and reason 172

The general character of the evidence in proof of forgery admitted over exception in this case 178

Evidence tending to show mere probability, inadmissible 180

The opinion of the Court of Appeals on the questions arising under the issue of forgery 183

Evidence of opinions based on the style and composition of the paper in controversy and the etiquette to be observed by Judge Holt toward his superior officers 200

The error in admitting opinion evidence was not cured by the subsequent instruction to disregard 209

The ruling of the Court of Appeals on the the opinion testimony 217

THE QUESTIONS OF REBUTTAL EVIDENCE 219

The opinion of the Court of Appeals on rebuttal evidence 224

A NEW TRIAL, IF GRANTED, SHOULD BE CONFINED TO THE ISSUE OF FORGERY 226

CONCLUSION 243

In the Supreme Court of the United States

OCTOBER TERM, 1899.

No. 103.

JOSEPHINE HOLT THROCKMORTON AND LUKE DEVLIN, PLAINTIFFS IN ERROR,

vs.

WASHINGTON D. HOLT ET AL., DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR.

This case is brought here by writ of error to the Court of Appeals of the District of Columbia (Rec., p. 162) to review the judgment of that court (Rec., p. 162) affirming the final judgment of the Supreme Court of the District of Columbia (Rec., p. 14), denying probate to a paper writing dated February 7, 1873, purporting to be the last will and testament of Joseph Holt, deceased (Rec., pp. 20, 148).

THE QUESTIONS IN THIS CASE.

The main questions of law raised by the Record in this case have never before been presented to this court.

The gravity and importance of the questions and the far reaching consequence in will contests of this court's decision thereon, seem not only to justify but to require of counsel

the most exhaustive research of precedents and the fullest presentation in argument. The consequent length of this brief suggests to counsel the propriety of stating, at the outset, the principal questions of law presented. They may be stated thus:

1. Is evidence of a revocatory *animus* admissible to prove revocation in the total absence of evidence of any revocatory *act* by the testator?

2. Is evidence of the declarations or acts of the decedent wholly disconnected with the alleged act of execution and having no relation to the paper in controversy, admissible to disprove the physical act of execution?

It is freely admitted that the acts and declarations of a testator tending to show his state of mind, his motives, feelings or intentions are admissible on issues involving either testamentary capacity or undue influence.

It is also admitted that such acts and declarations are admissible upon an issue of revocation either to support or rebut a presumption of law arising from any act revocatory in character done or authorized by a testator.

But it is denied that such evidence is admissible on an issue of revocation in the entire absence of any evidence, of any act, revocatory in character, done or authorized by the testator.

It is also denied that such evidence, wholly disconnected with the fact of execution and having no relation to or connection with the paper, is admissible either to prove or disprove the physical act of execution.

There are subsidiary questions in themselves very important, but the foregoing are the main questions presented by the Record.

The Proceedings Below.

Joseph Holt died in Washington, August 1, 1894, leaving

an estate consisting of real estate valued at about $40,000 and personal property valued at about $140,000, all of which purports to be disposed of by the will in controversy (Rec., pp. 1, 49). This proceeding concerns only the personal estate.

On August 17, 1894, a petition for letters of administration was filed by some of his next of kin, and eventually, on September 28, 1894, letters of administration were issued to The National Safe Deposit, Savings & Trust Company of the District of Columbia (Rec., pp. 1, 5). Before the administration was completed, and on August 26, 1895, the Register of Wills of the District of Columbia received through the mail an envelope addressed to him, containing a paper purporting to be the will of said Holt (Rec., pp. 20, 21, 148). On September 20, 1895, Luke Devlin, one of the plaintiffs in error who was named as executor by that paper, filed his petition for probate of the same and the issuance of letters testamentary to him (Rec., p. 4). On October 14, 1895, the next of kin of said Holt filed a caveat, to which the said Devlin and the two legatees under the will filed their answer December 2, 1895, (Rec., p. 9). On March 20, 1896, the Supreme Court of the District of Columbia, holding a special term for Orphans' Court business, transmitted to a special term of said court, sitting as a circuit court, for trial by a jury, certain issues, viz: Forgery, fraud, undue influence and revocation (Rec., p. 12). These issues were tried before the court and jury, the trial lasting from May 18, to June 25, 1896 (Rec., pp. 20, 13) and resulting in a verdict against the will on the issue of forgery (Rec., p. 13) upon which the court, at a special term for Orphans' Court business on July 10, 1896, entered a final judgment, denying probate to the paper (Rec., p. 14). From this judgment, the caveatees, on the same day, appealed, and, on June 30, 1897, *nunc pro tunc*, the bill of exceptions was duly signed and sealed, and the record was transmitted to the Court of Appeals, July 29, 1897 (Rec., pp. 142, 143). In

the meanwhile, on August 3, 1896, one of the caveatees, Elizabeth Hynes, withdrew her appeal (Rec., p. 16). As by the will the whole estate is equally divided between Miss Hynes and Miss Thockmorton, one of the plaintiffs in error, Miss Hynes' withdrawal reduced the amount involved in the subsequent proceedings by one-half, or to about $70,000. On April 6 and 7, 1898, the cause was argued before the Court of Appeals (Rec., p. 145), which court, on May 3, following, affirmed the judgment of the court below (Rec., p. 162), and finally, on May 13, 1898, the writ of error bringing the record to this court for review was sued out (Rec., p. 162).

STATEMENT.

By the rulings of the trial justice, made over objection and exception of the plaintiffs in error, who were caveatees below, a mass of testimony, covering practically the whole life of the decedent, was admitted in evidence.

Judge Holt's Life and Family.

Laying aside for the present all question as to the admissibility of any of this evidence, it appears therefrom that Joseph Holt was born in Kentucky in the year 1807, and resided there, with the exception of a short period when he lived, in Mississippi, until 1856. During that year he came to Washington as a member of President Buchanan's cabinet, and from that time resided here until his death, at the advanced age of eighty-seven years, on the first of August, 1894 (Rec., pp. 49, 108). In 1862 he became Judge Advocate General of the Army and Chief of the Bureau of Military Justice, holding this office until his final retirement from official life in or about September, 1875 (Rec., pp. 22, 43).

He was twice married, first in 1837 to Miss Mary L. Harrison, who died in 1846. Four years later, in 1850, he

married Miss Margaret Wickliffe, and was again left a widower in 1860, no children having been born to him by either marriage (Rec., pp. 49). The remaining thirty-four years of his life he spent alone, unattended by any relative, his household consisting merely of his domestic servants (Rec., p. 80).

His father died prior to 1861 and his mother in 1871. He had one sister and three brothers. The sister, Elizabeth Sterett, died in 1863, leaving two children, William G. Sterett and Margaret T. Bowmer. His brother James died in 1867 childless. His brother, Robert S., also died in 1867, leaving nine children, six of whom, Lockie W. Iglehart, Sarah Holt, Robert S. Holt, John W. Holt, James Holt and Thomas Holt survived Judge Holt. His brother Thomas died in 1876, leaving one child, Washington D. Holt (Rec., p. 49).

These several nieces and nephews were the caveators in the court below and are the defendants in error here. In 1873, the year of the will, these same persons were his only next of kin, with the exception of Washington D. Holt, whose father, as above stated, did not die until three years later, and two children of Robert S., who died after that time and prior to 1894 (Rec., p. 60).

When the civil war broke upon the country Joseph Holt espoused the Union cause with both zeal and bitterness, while his relatives allied themselves with the Confederacy, several of them being in the Confederate army (Rec., pp. 49, 60).

The Persons Named in the Will.

Though as already stated, neither of Judge Holt's marriages was blessed with children, his union with Miss Harrison brought into his life and household and committed to his charge a child, a little girl, then but five years old, the caveatee Elizabeth, or Lizzie Hynes, one of the beneficiaries named in the will in controversy.

Left an orphan in infancy this child was committed to

the care of her uncle, Dr. Harrison, the father of the first Mrs. Holt, who was also the guardian of Lizzie Hynes and in some way had lost all her property (Rec., p. 94). She was and had been from her infancy under the especial charge of Miss Harrison, to whom at the time of their marriage Judge Holt promised to care for the child, solemnly repeating this promise to his wife as she lay on her death bed (Rec., p. 94). He called her his "little girl," sent her to school, paid all her expenses, and indeed from the time of his marriage in 1837 till his death entirely supported her (Rec., p. 90). After his first wife's death he used often to visit her and have her visit him, and later when he lived in Washington, she, continuing to reside in Kentucky where her home still is, frequently accompanied him on pleasure trips and sometimes visited him at his home. In the spring of 1884 he gave her ten thousand dollars in six per cent. bonds, explaining that he sometimes forgot to send her money when she needed it, but that she was not to depend exclusively upon the income therefrom, and that she was to write to him whenever she wished more. This she did, and he continued to remit money to her, faithfully fulfilling to its letter and in a spirit of generosity and affection the promise to his deceased wife (Rec., pp. 91, 94).

In the summer of 1884 he said to her:

> "I want to talk with you; I have never talked to you seriously about this matter, but I want you to remember you are amply provided for besides the $10,000 I have given you" (Rec., p. 91).

On February 24, 1885, he wrote her addressing her as "My precious cousin," and stating among other things:

> "You can not rejoice in your independence more than I do—I trust that it will be hereafter in my power to make you yet more so. I should be very wretched, indeed, if I thought you would ever be left to the tender mercies of the world, which, in its selfishness, turns its back on the helpless, but is pro-

> fuse in its offer of assistance to those who do not need it. Have no fear—you are safe now, but will be safer in due time" (Rec., p. 91).

In 1858 Judge Holt made the acquaintance of Major Charles B. Throckmorton, who was then a boy sixteen years of age. The following year Judge Holt, then being Postmaster General, appointed Throckmorton to a clerkship under him in his department, and later, when the civil war broke out, used his influence to procure that young man a second lieutenancy in the Union army (Rec., p. 108).

The Throckmorton family sympathized with the South, Throckmorton's father having entered the Confederate army, and it was due to Judge Holt's influence that this young man espoused the Union cause; thus furnishing an example, not unusual during that conflict, of father and son serving in the opposing armies (Rec., p. 108).

During the war Judge Holt kept up a correspondence with the young officer, and their relations were most friendly (Rec., p. 108). The high esteem in which he held him is strikingly shown by the many expression of confidence and affection contained in Judge Holt's letters written him at that time (Rec., p. 114). Thus, on October 4, 1861, Judge Holt writes:

> "I was gratified beyond measure at the mention of your gallant bearing on the field of Bull Run, which is found in the report of your commanding officer. You have only realized my anticipations; but I was delighted that you should so early have had an opportunity of vindicating the confidence reposed in you by your country."

And again, July 16, 1863:

> "All that I have heard of you has fulfilled my early expectations & has been to me a source of the highest gratification. As you have begun, so I am sure you will continue to the end—earnest, outspoken and heroic in your loyalty, & in your love

> of a country and Government, every throb of life has teemed with blessings & honors for the American people."

And on August 5 of the same year:

> "Your record is without a stain, & my conviction is complete that it will grow brighter & brighter with the years that are to come."

Further evidence of his estimate of Major Throckmorton is found in the letter of December 9, 1876, written by Judge Holt to President Grant, highly commending Major Throckmorton's military services and recommending him for appointment as major, in which letter, speaking of Major Throckmorton, he says:

> "He entered the army in March, 1861 & though then but a youth he remained faithful to the flag, in despite of the remonstrances & importunities of his father, who sought to carry him with himself into the military service of the rebellion" (Rec., p. 111).

On February 7, 1873, the day that the will bears date, and on September 29, 1873, in letters to Major Throckmorton's wife (Rec., pp. 112–113) will be found further expressions of his appreciation of and regard for Major Throckmorton, while he concludes a letter to Major Throckmorton's wife, dated January 12, 1880 (which was intended 1881), (Rec., p. 108), with the following words:

> "I beg you will express my warmest thanks to the Major, for his very kind & most welcome letter. He has been my constant, true friend through many long & weary years. His friendship, always heartily reciprocated—has cheered & blessed me, & I am & shall always be most grateful for it, as I am for your own words now before me" (Rec., p. 109).

In 1863 Major Throckmorton married Miss Fannie Wickliffe, the cousin of Judge Holt's second wife, having been

previously strongly commended to the Wickliffe family by Judge Holt (Rec., p. 108).

In 1866 there was born to Major and Mrs. Throckmorton their first child, a daughter, who was named Josephine Holt Throckmorton, for Judge Holt (Rec., p. 108). She is the other beneficiary named in the will in controversy and one of the caveatees in the court below and plaintiffs in error here.

Judge Holt wrote to Major Throckmorton acknowledging the compliment in naming his first child for him, saying:

> "I am in receipt of your kind note of the 8th inst. advising me of the birth of a little daughter in your home, & that you have honored me so far as to give her my name. I accept this as a great compliment from cousin Fannie & yourself, & as a recognition of one (*sic*) friendly relations which has deeply touched my heart & for which I am most grateful" (Rec., p. 114).

He consented to act as godfather for the little one, sending a silver mug as a present, and a bottle of water for the christening which he had brought from the River Jordan (Rec., p. 108).

He developed great affection for this little girl, showed her much attention, taught her to call him "Bon Pere" and made her many presents (Rec., p. 115).

Major and Mrs. Throckmorton had one other child, a son, named Wickliffe (Rec., p. 116).

Some indication of the attitude of Judge Holt towards these children is disclosed in his letter of February 7, 1873, to Mrs. Throckmorton (Rec., p. 112), in which he says: "Give my love to the dear little children and tell them that I think of them and love them always." While in his letter of September 29, 1873 (Rec., p. 113), speaking of these children, he says:

> "If I could only hear the bright joy of those dear little children my ears would have a peace which the saints cannot provide for them here."

Major Throckmorton's mother, who, at the time of the trial was over eighty years of age and of feeble health and memory (Rec., p. 108), sustained until 1880 very friendly relations with Judge Holt. She used to visit him, he placed his carriage at her disposal, and directed his coachman to drive her whenever and wherever she desired to go (Rec., p. 83).

In 1880, in consequence of some representations she is supposed to have made to the effect that Miss Lizzie Hynes had ridiculed Judge Holt, he became angered with her and their friendly relations terminated. While this circumstance necessarily placed Major Throckmorton in a delicate position, it occasioned no ill-feeling between him and Judge Holt (Rec., p. 110), as is most clearly demonstrated by the expressions contained in Judge Holt's letter of January 12, 1881 (erroneously dated 1880), (Rec., p. 108), to Major Throckmorton's wife, after the occurrence and with reference to that very matter (Rec., p. 109).

Nor was this the only episode of the kind occasioned by woman's indiscretion. According to the evidence of the caveator, Mrs. Bowmer, her friendly relations with Judge Holt were terminated in 1879 by the false representations of Washington Holt's wife and mother that she had criticised him, and notwithstanding her efforts towards reconciliation, none was ever effected (Rec., p. 64).

During Judge Holt's incumbency of the office of Judge Advocate General from 1862 to 1876, he was in daily contact with Luke Devlin, who is named as executor in the will in controversy, the other caveatee in the court below and plaintiff in error here. Devlin was employed as a copyist and messenger and later as clerk in that office, having his desk in a room next but one to that occupied by Judge Holt. Devlin during this period frequently met Judge Holt socially at the house of Mrs. Throckmorton, Sr., occasionally called on him, and their official relations were always friendly and kindly (Rec., pp. 22, 43, 81, 85).

After Judge Holt's retirement from office Devlin met him more or less frequently until 1878, and between that time and the time of his death often called upon him and occasionally met and conversed with him elsewhere (Rec., p. 22).

Judge Holt's estimate of this man is evidenced by his letters of commendation and his letter of March 26, 1867, to Mr. Stanton, then Secretary of War, recommending Devlin for an appointment to a lieutenancy in the army (Rec., pp. 88, 89).

Judge Holt's Relatives.

The evidence as to the life of Judge Holt shows that there was little personal intercourse between him and his family. They were early separated, and with the exception of his mother he saw little of any of them until during the last decade of his unusually long life. They were scattered in their places of residence. Prior to 1856 Judge Holt resided in Louisville, Kentucky, as appears by his will of 1848 (Rec., p. 44); his father and mother lived at Holt's Bottom, in Breckenridge county (Rec., p. 50); his brother Robert lived in Mississippi (Rec., p. 49); while his brother James and his sister, Mrs. Sterett, lived in Texas (Rec., p. 68).

From 1856, when he came to Washington, until 1889 none of his relatives resided in this District. In 1889, sixteen years after the date of the will, one of these relatives, William G. Sterett, took up his residence in Washington (Rec., p. 67), and with this exception none of his relations lived near him during the last thirty-eight years of his life, but all of them resided at places more or less remote from his home (Rec., pp. 50, 54, 60, 69, 78).

There is some general testimony (Rec., pp. 49, 50) to the effect that in 1873, the year of the will in controversy, the relations between Judge Holt and his then living relatives were not unkindly. But the facts show that from the time of the civil war there had been strained relations and little

intercourse between him and these relatives. Omitting his letters to his mother, who died in 1871, his correspondence with the family of his brother Robert consisted of one letter, in 1867, to Robert (Rec., p. 50) and one to Robert's daughter (Rec., pp. 51, 52) on the occasion of some mental malady affecting the latter. His correspondence with the family of his brother Thomas was limited to one letter to Thomas' wife and one to her daughter in law, the wife of Washington Holt, and two letters to Thomas of a business character (Rec., pp. 52–54). The only correspondence with the children of his deceased sister was a single letter to Mrs. Bowmer (Rec., p. 53). Between the breaking out of the civil war and the death of his mother in 1871, a period of ten years, he visited his mother's family at the old homestead but once, in 1870, at which time the caveator, Margaret T. Bowmer, testifies that "there were cold and strained relations between him and said family" (Rec., p. 64). He did not at that time, nor for many years afterward, visit either of the children of his deceased sister, and one of them, William G. Sterett, testifies that he did not know that Joseph Holt knew whether he, Sterett, was living or not in 1873, and that there was no intercourse between them of any kind between 1864 and 1878, a period of fourteen years (Rec., p. 68), while Mrs. Bowmer testifies that after the first year of the war Judge Holt never visited her father's house (Rec., p. 64). His relations at that time with his remaining relatives, namely the children of his deceased brother Robert, is best shown by the testimony of Robert S. Holt, Jr., one of the caveators, who says that Judge Holt had become very much embittered toward the South and Southern people, this bitterness extending to some of his, Judge Holt's, family, though, as the witness claimed, it did not extend to his own father and the latter's immediate family. Still he says that prior to 1883 there was no communication of any kind between Judge Holt and the witness, the witness—

"feeling that, if Joseph Holt had permitted the

> bitterness engendered by the war to render him indifferent toward witness, the first advances toward reconciliation must come from him" (Rec., p. 60).

He also says that, though he had not felt unkindly toward Judge Holt, he had been—

> "somewhat resentful that the latter had permitted the bitterness growing out of the war to so affect his relations to his family that he had apparently manifested no interest in the family of his brother, consisting of nine children, the eldest of whom was a student at college at the time of their father's death";

and that there had been, not merely an absence of aid or assistance, which was not necessary, but of such "interest, sympathy, and friendship as might be manifested in other ways" (Rec., p. 61).

Notwithstanding the fact that, for a short while prior to 1856, Judge Holt lived in Mississippi, where his brother Robert resided, it does not appear that he ever saw any of Robert's children until after the war. In 1868 he saw Sarah Holt for the first and only time, at an asylum in Philadelphia (Rec., p. 51). Mrs. Iglehart, who was born in 1850, he never saw until 1874, when she visited Washington on her wedding trip (Rec., p. 54). Robert S. Holt, who was born in 1855, he met in 1875 or 1876 for the first and only time when he visited Robert Holt's mother in Evansville, Indiana, to which place she had removed from Mississippi in 1868 (Rec., p. 60), while Thomas H. Holt, who was born in 1858, after Judge Holt came to Washington, he did not see until the later years of his life (Rec., p. 50). Some time after the war and before February, 1873, he saw Joseph while the latter, with his mother, was for a few days in Washington. What year this was is not disclosed in the evidence (Rec., p. 49).

Some time after 1873 cordial relations between Judge Holt and some of his relatives began to be established, as is shown by the correspondence in the Record. The general tendency of this evidence is to show an increasing kindliness and re-

gard for Washington Holt and his family—particularly his wife (Mrs. Vanda Holt), who was not a relative of Judge Holt. To Washington Holt's wife and daughter he appears to have been in later years, not only liberal, but munificent, in his gifts (Rec., pp. 69, 74, 75, 78), to such an extent that a bequest of the residue of his property to strangers to his blood could not be regarded by them as unreasonable or unkind, except under the stimulus of extreme selfishness or cupidity.

Judge Holt's Home Surroundings at the Time of His Death.

As before stated, for the last thirty-four years of his life Judge Holt's household consisted only of himself and servants, upon whom he became more and more dependent as his life drew near its close. For several years prior to his death he suffered from a progressive disease of the eyes, culminating in almost total blindness; and during this time he was accustomed to employ his servant Strothers to write letters for him at his dictation (Rec., pp. 79, 87).

During all these years of loneliness he seems not to have desired the companionship in his home of any of his next of kin; and while there is evidence tending to show that some of them visited him more or less frequently in the later years of his life, none of them ever became an inmate of his home to cheer by his or her presence and sympathy his declining years.

From 1889 until 1894, the five years immediately preceding his death and covering the period of his affliction resulting in the loss of his sight, only one of his relatives lived in Washington, that one being the caveator, William G. Sterett (Rec., p. 67). During the winter of 1893, however, Mary Holt, the daughter of Washington Holt, spent several months in Washington, living, not with her uncle, Judge Holt, but at a boarding house (Rec., p. 69).

In July, 1894, Judge Holt had a fall on the staircase in

his house resulting in injuries which confined him to his bed (Rec., p. 80).

None of his relatives called to see him during this time or to offer any assistance or sympathy in his affliction, and about a week later, on August 1, 1894, at the advanced age of 87 years, Judge Holt died in his house alone, with only his colored servants to minister to him in his last hours (Rec., pp 1, 49, 80).

Immediate Possession of Judge Holt's House and Effects Taken by Cavcators.

Immediately after Judge Holt's death, however, William G. Sterett, and his wife, went to Judge Holt's house, and took possession of the same, they and the servants being the only occupants until the next day, when Washington, D. Holt and his wife arrived, and the keys of Judge Holt's desk and closet where his private papers were kept were by the servants delivered to Washington D. Holt (Rec., p. 80).

It is established by the evidence offered by the caveators that Judge Holt was most particular and methodical in the keeping of papers. His papers were arranged and endorsed in such good order that after his sight failed him he could direct his servants where to find any paper he desired to consult. According to the testimony of the caveators, not only business papers, but old private letters, newspapers, and even advertising circulars were preserved by him. He destroyed nothing. He even rebuked the servant, Charles Strothers, on one occasion for having burned a spoiled bank check, telling him to burn nothing (Rec., pp. 80, 81, 87).

His will of 1848 (Rec., pp. 44–47) was not burned, torn or in any wise mutilated, but was preserved by him in its original condition and integrity to the day of his death, forty-six years after its execution; and though, by reason of the changes wrought by time, scarcely any provision in it was capable of being carried out at the time of his death,

it remains, as when executed, unaffected by any act of his, save the endorsement on the wrapper enclosing it (Rec., p. 167).

Unlawful Disturbance and Destruction of Judge Holt's Papers by Caveators.

After Washington Holt got possession of the decedent's keys from the servants, he and Sterett proceeded to make search among his papers for a will. In doing this they created much confusion and disorder among the papers, scattering them about (Rec., p. 48). They and the servant Strothers, by their direction, burned a quantity of papers belonging to the deceased—some in a coal-scuttle in the yard and others on the hearth in Judge Holt's bedroom (Rec., pp. 80, 81, 87).

That the quantity of papers burned in this way must have been considerable appears from the fact that Strothers, a witness for the caveators, states " that they were burned *one chilly day to make a fire* and *the fire was kept up with them*" (Rec., p. 87). Washington Holt and Sterett did not confine their search to the papers in Judge Holt's house, but also had access to and examined those in his safe deposit box, and they claim that no will, except the one of 1848, was found in any place (Rec., p. 80).

After the search among and the burning of the papers above described, and some two weeks or more after the death of Judge Holt, the Register of Wills and his assistant were invited by Washington Holt and Sterett to come to the house and make another search for a will among the papers already examined by them (Rec., p. 48).

The object of this second and quasi-official search is not explained by the testimony, but that they knew it must be fruitless is evidenced by the fact that Washington Holt offered to the Register of Wills a reward of forty thousand dollars and to his assistant one of five thousand dollars, if

they should find a will. The search was, of course, without result (Rec., p. 48).

It was by the testimony of this assistant to the Register of Wills that the fact was first brought to light that papers of the deceased had been burned, that official testifying that he "saw in a grate that a considerable number of papers had been burned;" that he—

> "suggested sealing up the papers, because he saw how things were going on there, and he thought it best to do so until somebody in authority took charge" (Rec., p. 48).

Spoliators, the Sole Source of Information as to Papers Burned, Continue in Control.

While it is an established and undisputed fact that this burning of the decedent's papers was done by Washington Holt and Sterett, or Strothers, acting under their orders, yet as to what the papers were which were so destroyed, and why they were burned, the court is dependent wholly upon the testimony of the parties engaged in their destruction. Reference to that testimony will be made hereafter; but at this point it suffices to say that before administration granted, and without lawful right and without opportunity for inspection by others, papers belonging to the deceased were destroyed by burning by two of the caveators, who would be interested in the destruction of the will in controversy, or by Strothers, under their direction.

It is a noticeable fact that the caveators, who, from the moment Judge Holt breathed his last, have been in absolute control of all his papers and effects, do not produce a single letter addressed to Judge Holt by any of themselves; and in this connection it is most important to note that among the papers burned were, according to their testimony, a number of letters from Washington Holt and his family (Rec., p. 80).

Shortly after the death of Judge Holt this same man

Strothers, who appears as a witness for the caveators, was, by them, put in charge of the residence of Judge Holt, and together with his wife and mother occupied it, rent free, down to and during the time of the trial. He was permitted to conduct a wood and coal business on a portion of the premises, which he lettered with signs relating to that business, and was also permitted to rent out part of the property for his own benefit (Rec., p. 87).

The testimony of an expert in handwriting, which is not contradicted, is to the effect that the writing on the envelope in which the will in controvery was sent to the Register of Wills, was done by this same man Strothers, who assisted Washington Holt and Sterett in the burning of Judge Holt's papers (Rec., pp. 99, 100).

Washington D. Holt, William G. Sterett and John W. Holt, in their petition for letters of administration, allege that "after careful and diligent search and inquiry in respect of a will," they are advised that said Joseph Holt died intestate, and pray that they, the petitioners, be appointed administrators (Rec., pp. 1–3). Letters of administration, however, were granted, not to the petitioners, but to the National Safe Deposit, Savings and Trust Company of the District of Columbia, which proceeded with the administration of the estate (Rec., p. 4).

The Will Anonymously Sent by Mail to the Register.

Before the administration was completed, and about two months before the time for distribution of the estate, on the 26th of August, 1895, there was delivered to the Register of Wills, in the ordinary course of mail, an envelope addressed "To the register of wills, Washington, D. C.," which, upon being opened by that officer was found to contain a paper purporting to be the last will and testament of Joseph Holt, the paper in controversy in this case (Rec., p. 21).

The envelope was mailed on Saturday, the 24th of August, 1895, by being deposited in one of the U. S. mail boxes in

the northwest section of this city, being that portion bounded by North Capitol Street, the Mall and Georgetown, some time between the hours of three and four P. M. (Rec., pp. 119, 120). By reason of Sunday intervening it did not reach the Register of Wills till Monday morning. At the time of its mailing Miss Hynes was in Kentucky, Luke Devlin was residing in Washington and Miss Throckmorton and her family in New York. Miss Throckmorton in her testimony in rebuttal, upon her direct examination testifies that she had been on a visit in Virginia and passed through Washington on the 24th of August, 1895, on her way home and was at the Baltimore and Potomac Railroad station for about an hour that afternoon, awaiting train connection for New York, leaving about three o'clock (Rec., p. 116).

No letter or communication of any kind was enclosed with the will and the address on the envelope is apparently in unnatural and disguised writing. The paper in controversy purports to be written and signed by Joseph Holt, and to be attested by General U. S. Grant, then President of the United States, General William T. Sherman, then General of the Army, and his wife, Mrs. Ellen B. E. Sherman. It bears date February 7, 1873, and divides the entire estate between Elizabeth Hynes and Josephine Holt Throckmorton and appoints Luke Devlin executor (Rec., pp. 20, 21, 148).

When received by the Register of Wills, the paper in controversy was in the condition in which it now is, burned and torn in places, but entirely legible, and the seal, if there ever was one, gone (Rec., p. 21).

Subscribing Witnesses all Assembled at Judge Holt's House in the Month and Year the Will Bears Date.

In February, 1873, the month and year that the will in controversy bears date, all the persons whose names appear as witnesses to that paper were assembled in Judge Holt's house.

During that month he gave a dinner party to *ten* persons,

having for his guests the President and Mrs. Grant, General and Mrs. Sherman, the Secretary of State and Mrs. Fish, Mrs. Ricketts and three other persons (Rec., p. 87).

In a letter written by Judge Holt to Major Throckmorton's mother (Rec., p. 117) he expresses concern lest General and Mrs. Sherman should not be present because General Sherman's regular weekly reception occurred the same evening and seeks Mrs. Throckmorton's aid to secure their presence at the dinner.

From that letter it appears that Mrs. Throckmorton was one of the guests at that dinner, because in it Judge Holt suggests:

> "As the weather will prevent you from seeing Mrs. S., could you not address her a note this evening urging her to *meet you* at the dinner?" (Rec., p. 117).

The exact date of this dinner could not be ascertained. From his account of expenses Judge Holt appears to have given a dinner on the 21st of February, 1873, (Rec., pp. 117, 118), but this was unquestionably a different occasion as it was for *seventeen* persons (Rec., p. 118).

Proceedings for Probate of Will.

On the 20th of September, 1895, the petition of Luke Devlin, for the probate of this paper was filed; the caveators appeared and filed a caveat which was answered by the executor and beneficiaries under the paper and issues were framed thereon and directed to be tried by a jury (Rec., pp. 4, 12). At the trial two of the issues were abandoned by the caveators, and evidence was only offered upon the remaining two, raising the questions of forgery and revocation (Rec., p. 127). The subscribing witnesses to the paper, General Grant, General Sherman, and Mrs. Sherman had all died before Judge Holt, and the caveatees, in making out their case in chief upon the issue of forgery offered testimony tending to prove the genuineness of the signatures of the witnesses; General Grant's signature being proved by

his son, Frederick D. Grant; General Sherman's by his brother, Senator John Sherman, and Mrs. Sherman's by her son, P. Tecumseh Sherman (Rec., pp. 20, 21).

They also offered testimony tending to show that the body of the will and signature of Joseph Holt were in his handwriting; the testimony in this behalf being that of a number of persons intimately acquainted with Judge Holt and having special familiarity with his handwriting (Rec., pp. 23, 25). Among these witnesses who testified to the genuineness of the will was the Hon. Robert R. Hitt, of Illinois, who, upon cross-examination was asked if the phraseology of the paper exhibited Judge Holt's characteristics of composition (Rec., p. 26). This was objected to by the caveatees, and after very full argument by counsel the court sustained the objection, holding testimony of that character to be clearly incompetent (Rec., pp. 23–28). The caveatees also offered the testimony of the two beneficiaries and the executor named in the will, to the effect that none of them had been in possession of or seen the paper until after its receipt by the Register of Wills (Rec., p. 22), and then rested their case (Rec., p. 28).

It is important to observe here and bear in mind throughout the consideration of this case that the evidence offered by the caveatees in their case in chief was confined exclusively to the proof of handwriting and to the denial on the part of all the persons interested under the paper that they had any knowledge of its existence until after its receipt by the Register of Wills. When the defendants in error proceeded to offer their testimony, they did not confine themselves to evidence as to handwriting, but claimed the right to offer in evidence testimony as to the alleged conduct and declarations of Joseph Holt, as to his relations with his next of kin, his intentions as to the disposition of his estate, and his feelings towards persons more or less remotely connected with the parties named in the will in controversy.

All this class of evidence was objected to by the caveatees

as inadmissible upon either the issue of revocation or that of forgery, but was admitted by the court upon both these issues, to which the caveatees excepted. These exceptions, and those taken to the instructions to the jury and the charge of the court, constitute the errors assigned as ground for reversal by this court of the judgment of the court below.

ASSIGNMENT OF ERRORS.

1. The court erred in admitting in evidence as competent to prove that the will in controversy had been revoked, testimony as to alleged acts and declarations of Joseph Holt, indicating his personal relations with certain of his next of kin and certain persons nearly or remotely connected by consanguinity or affinity with the persons named as beneficiaries in the will in controversy, as set forth in exceptions Nos. 4, 5, 10, 11, 12, 13, 15, 16 and 17 (Rec., pp. 34–35, 35–36, 49–50, 60–67, 68–78, 82–83, 83–84).

2. The court erred in admitting in evidence as competent to prove that the will in controversy had been revoked, testimony as to alleged declarations of said Joseph Holt as to actual or intended dispositions by will of some of his property, as set forth in exceptions Nos. 2, 6 and 14 (Rec., pp. 28–29, 36–39, 78–79).

3. The court erred in admitting in evidence as competent to prove that the will in controversy had been revoked, testimony tending to show the existence in 1886 of hostile feelings by said Joseph Holt towards the husband of a niece of one of the beneficiaries under the will as set forth in exception No. 20 (Rec., pp. 94–95).

4. The court erred in instructing the jury upon the issue of revocation as prayed by the caveators in their prayers numbered 4 and 7, set forth in exceptions Nos. 25 and 26 (Rec., p. 120).

5. The court erred in refusing to instruct the jury upon

the issue of revocation as requested by the caveatees in their prayers numbered 3, 5, 6, 12 and 13, set forth in exceptions Nos. 31, 32, 33, 34 and 35 (Rec., pp. 122, 123).

6. The court erred in admitting in evidence as competent to prove that the will in controversy was a forgery, testimony as to declarations alleged to have been made by said Joseph Holt, many years after the date of the will in controversy, as to actual or intended dispositions of his estate inconsistent with the will in controversy as set forth in exceptions Nos. 2, 6 and 14 (Rec., pp. 28–29, 36–39, 78–79).

7. The court erred in admitting in evidence as competent to prove that the will in controversy was a forgery, testimony as to alleged acts and declarations of said Joseph Holt, occurring many years after the date of the will in controversy, as to his then existing relations with and feelings towards certain of his relatives not named in said will, as set forth in exceptions Nos. 10, 11, 12, and 13, (Rec., pp. 49–50, 60–67, 67–68, 68–78).

8. The court erred in admitting in evidence as competent to prove that the will in controversy was a forgery, testimony as to alleged acts and declarations of said Joseph Holt tending to show the existence in his mind, many years after the date of said will, of hostile feelings towards persons nearly or remotely connected by consanguinity or affinity with persons named as beneficiaries in said will, as set forth in exceptions Nos. 4, 5, 15, 16, and 17 (Rec., pp. 34–35, 35–36, 82–83, 83–84).

9. The court erred in admitting in evidence as competent to prove that the will in controversy was a forgery, the opinions of witnesses, that the said will was a forgery because of its grammatical and rhetorical style of composition, as set forth in exceptions Nos. 7, 8, and 9 (Rec., pp. 40–42, 43, 44).

10. The court erred in admitting in evidence as competent to prove that the will in controversy and the signatures of the witnesses thereto were forged, testimony as to the

characteristics of said Joseph Holt with reference to his treatment of his superior officers, such as General Sherman and President Grant, as bearing upon the probability of his having asked such persons to witness his will, as set forth in exception No. 3 (Rec., pp. 30–31).

11. The court erred in instructing the jury upon the issue of forgery as set forth in exceptions Nos. 36, 37 and 38 (Rec., pp. 131, 141–142).

12. The court erred in excluding in rebuttal the opinion of John A. Bingham, based upon his knowledge of the grammatical and rhetorical style of composition and handwriting of said Joseph Holt, that the will in controversy was genuine, as set forth in exception No. 22 (Rec., pp. 104–108).

13. The court erred in excluding the rebuttal testimony of P. Tecumseh Sherman that certain features in the signature of General Sherman to the will in controversy, which a witness for caveators regarded as evidence of forgery, were, in fact, of frequent or habitual occurrence in the genuine signature of General Sherman, as set forth in exception No. 21 (Rec., pp. 101–104).

14. The court erred in admitting in evidence in surrebuttal the testimony, offered by the caveators, of Martha Scott, as set forth in exception No. 24 (Rec., pp. 118–119).

ARGUMENT.

Before entering upon the discussion of the questions of law raised by the assignment of errors, it seems proper briefly to explain the course of proceedings from which the judgment in this cause results.

The Law and Practice of this Jurisdiction in Will Contests.

By the law and practice in the District of Columbia when a contest is made as to the validity of any last will and tes-

tament propounded for probate, the Supreme Court of the District of Columbia, holding a special term for Orphans' Court business, has the power and jurisdiction to hear and decide all matters touching the validity of such paper as a testamentary disposition of personal estate. By that law and practice, however, if at any time before judgment rendered in a contest, any party interested therein should demand a jury trial it is the duty of the court to frame an issue or issues presenting the material questions of fact in controversy between the parties, to be tried by a jury.

The practice in vogue under the act of Assembly of Maryland of 1798, Chapter 101, ever since its enactment, both in Maryland and this District, has been to frame those issues in the form of an interrogatory which the jury by its verdict could answer simply "yes" or "no" and that practice was observed in this case.

The issues presented were four in number. The second and third presented the questions of fraud and undue influence in procuring the execution of the paper, upon which issues no evidence was offered. They were abandoned at the trial and the court peremptorily directed the jury to answer each of them in the negative. No question was or is raised with reference to them upon this Record and they are as completely eliminated from consideration here as though they had never been transmitted for trial (Rec., p. 127).

The first and fourth issues which were tried by the jury are as follows:

> "1. Was the paper writing bearing date the seventh day of February, A. D. 1873, which was filed in this court on the 26th day of August, A. D. 1895, executed by the said Joseph Holt as his last will and testament?"
>
> "4. If the said paper writing was executed by the said Joseph Holt as his last will and testament has the same been revoked by said testator?" (Rec., p. 12).

Each of these issues, it will be observed on its face, in-

volves an inquiry into two things, namely, a physical and a mental fact.

The first issue involves the physical fact of execution by signing the paper in dispute and the mental fact of an *animus testandi.*

The ~~second~~ fourth involves the physical fact of the doing of some revocatory act by the testator and the mental fact of an *animus revocandi.*

Thus it will be seen that there was not presented for trial the general issue of *devisavit vel non*—the broad question, will or no will—under which any and all evidence against the validity of the paper tending to show it not to be a will, was admissible, but these simple, clear-cut interrogatories. Nor did the issues relate to every testamentary act or intent of the testator, but they were specifically confined to a particular paper, stated to have been filed in the court on the 26th day of August, A. D. 1895, a photo-lithograph of which paper appears opposite page 21 of the Record.

It is an undisputed fact in the case that this paper, with the exception of the signatures of Mrs. Sherman, General Grant and General Sherman, is wholly in the handwriting of Judge Holt or wholly a forgery.

It begins in the following form:

> "In the name of God Amen
> "— J. Holt of the City of Washington D. C. being of sound mind declare this to be my last Will & Testament"—

and concludes:

> "Signed and sealed by me in the presence of these witnesses in the City of Washington, D. C.
> "Feby 7th, 1873.
> "J. HOLT."

The paper in controversy is not only testamentary in character, in that it undertakes to dispose of the entire estate, real and personal, of the testator, but it in express terms de-

clares that it is the will of the testator, and that it is executed as such.

Judge Holt, the alleged testator, was at that time, and at all times, from his majority to the time of his death, a person of mental and legal capacity to make a will; was free from any imposition or fraud or undue influence, and if he wrote and signed the paper in controversy, he is in law conclusively presumed to have executed the paper "as his last will and testament," and these words, therefore, in the first issue, are conclusively answered by the paper itself, and no evidence to the contrary is admissible, unless at the actual time of its execution, and, as a part of the act of execution itself, the testator did declare his act not to be intended according to its legal purport, of which there is no pretense in this Record.

This is a fundamental principle of the law, essential to the integrity and validity of every written instrument. If it were permissible to show by other evidence than the instrument itself, and in the absence of any claim of fraud, coercion, accident or mistake, that the party who signed it did not know its contents, or did not intend its legal effect, the value of all written instruments would be instantly destroyed, and chaos would involve the business of the world.

While this is a fundamental principle it has not escaped controversy and has therefore required and received judicial affirmance. Counsel will not presume to burden the court with the consideration of authorities upon this primary and necessary principle of the law of written instruments. But it is deemed proper, in view of the phraseology of the issue transmitted for trial and of the character of the evidence offered and admitted over objection, to invite the court's attention to a few authorities on this particular question, as applied to the trial of an issue in like form to the one in this case, touching the validity of a will.

In Munnikhuysen *vs.* Magraw, 35 Md. 280, the following issue was proposed (p. 285):

"Were the contents of said paper writing fully ex-

plained to, or known or understood, by said Emily W. Magraw before or at the time the same is alleged to have been signed by her?"

This issue was, by the Orphans' Court, directed to be transmitted for trial by a jury, and on appeal the Court of Appeals held it to be "objectionable as calculated to mislead the jury and to raise and present improper and immaterial questions" (p. 287). Bartol, C. J., saying (pp. 287–288):

> "It being conceded that the testatrix was of sound mind, capable of making a will, it follows that if the paper had been in her possession, read and examined by her before it was executed, or read to her and approved; it is wholly immaterial for the jury to inquire whether its contents and meaning had been fully explained to her, or whether she understood their meaning and effect. Such knowledge and understanding would be presumed, and imputed to her by the law, if she knew the contents of the will.
>
> . . . . . .
>
> "Sane persons when they express themselves in writing, are presumed to mean what the writing imports, and it would be dangerous and in plain violation of the Statute of Frauds, to allow it to be impeached or overthrown by evidence *aliunde*, showing that they meant something else, or did not understand its true import and operation."

In Taylor *vs.* Creswell, 45 Md. 422, Robinson, J., says (p. 431):

> "It is essential of course to the validity of every will, that the party making it should know and understand its contents, otherwise it is not his will. But where a person of *sound* mind executes a will, and the same is his *free and voluntary* act, the law presumes knowledge on his part of its contents."

In Cramer *vs.* Crumbaugh, 3 Md., 491, Le Grand, C. J. says (p. 502):

> "The inquiry then is, is the reading of the will in

> the presence of the attesting witnesses essential to the validity of its execution? We did not consider the argument of the counsel for the appellant as going thus far, but merely as insisting it should *affirmatively* appear, that he either read himself, or had read to him, the will before he affixed his signature. . . . The proof is all one way as to his mental capacity. It is not pretended he labored under any feebleness of mind not common to him, and the witnesses describe him as a man of strong common sense, of resolute will, and not easily to be shaken from his purposes. Where the capacity of the party is wholly unimpeached and an absence of proof of fraud, the law presumes a knowledge on the part of the testator of the contents of the paper which he executes. This is the rule laid down by Sir John Nicholl, in Billinghurst *vs.* Vickers, 1 Phillimore, 187 (1 Eng. Eccl. Rep. 69), and that was a case in which the executor, who was also a legatee under the will, prepared that part of the will in which he was designated as executor and legatee. There was no direct proof that the will was read to him nor that he read it himself. As observed by Sir John Nicholl, in Fawcett *vs.* Jones, 3 Phillimore, 434 (1 Eng. Eccl. Rep. 452), 'it is a general leading principle that, when an instrument has been executed by a competent person, you must presume that the person so executing it knew its contents, and the effect of the instrument, and that he intended to give that effect to it.'"

Wharton, in his work on Evidence, says (2nd Ed., 1879. Sec. 1243):

> "And a party is assumed to have read the contents of an instrument executed by him; nor is evidence, when an instrument is offered against him, that he did not read it, admissible unless coupled with proof of fraud. To wills this inference has been frequently applied; though the inference may be rebutted by proof of facts indicating fraud, coercion or undue influence."

The importance of the foregoing rule, in its application to the present controversy, is that it eliminated from the

case all question as to the knowledge or intent of the testator, if he actually wrote and signed the paper; so that the only question which was before the jury for trial upon the first issue was as to the physical fact whether Joseph Holt wrote and signed the paper in controversy. The *animus testandi*, or other element of fact involved in the issue, was not open to trial, and no evidence in support of or against the existence of such an *animus* was admissible.

Under the fourth issue, it would be competent to show any physical act of legal revocation; but in this connection the same principle would apply. Had any written instrument been produced revoking this paper in express terms, or evidence tending to show the execution of such an instrument been offered, the *animus revocandi* would as conclusively attach to the revocatory words of such an instrument as would the *animus testandi* to the testamentary words of a will, and would have been equally closed against contradiction or qualification. No revocatory instrument was produced; not a scintilla of evidence appears in the Record tending to show the execution of any instrument containing any revocatory words, nor, in fact, the execution of any testamentary paper whatsoever, except the will in controversy and the will of 1848, found in the Record at pages 44 to 47.

The paper in controversy, however, at the time of its presentation to the court and of its submission at the trial appeared on its face to be torn and burned and so mutilated as to be revoked, if its physical condition was the result of an act or an express direction of the testator, done or given *animo revocandi.*

The fourth issue was therefore limited to the ascertainment of two facts, viz: First, whether the physical condition of the paper was the result of an act of Judge Holt or of any person by his express direction; and secondly, if so, whether such act was done or direction given with the intent to revoke.

Upon this issue evidence as to the intent of the testator

would plainly be admissible, provided there was evidence of any act of the testator to which an intent could apply. But it is submitted, that in the absence of evidence tending to show any act done by the testator, his intentions, if he had any, were utterly immaterial, and evidence as to any such supposed intention utterly incompetent and inadmissible.

It is also to be borne in mind that though this proceeding originated in the branch of the court exercising the jurisdiction formerly pertaining to the Ecclesiastical Courts, the questions here to be considered arose in a common law court in a trial by jury, and the correctness of the rulings is to be tested by the rules of evidence which govern trials of issues originating in common law courts.

It will be contended in this brief, and counsel confidently expect to make it a matter of demonstration from this Record, that the evidence in this case not only does not show that Judge Holt did, or directed to be done, any of the physical acts of defacement found upon this paper, but that the undisputed evidence in the Record conclusively and absolutely demonstrates that he did not do it, and that his only connection with this paper shown by the evidence or legally inferrable from any evidence in the entire Record, is the testimony tending to show that he wrote it.

There is another matter important for preliminary consideration.

It is to be observed that the two issues submitted for trial in this case are irreconcilably inconsistent. If the paper was a fabrication and a forgery its revocation was a physical and legal impossibility. If, on the contrary, it was legally revoked, such legal revocation would necessarily involve and establish its original genuineness, and absolutely destroy the pretension that it was a fabrication and a forgery. Evidence in support of these issues would therefore, necessarily be irreconcilably contradictory. Proof of fabrication would destroy the theory of revocation, while proof of legal

revocation would absolutely establish original genuineness and destroy the claim of fabrication and forgery.

Notwithstanding this obvious condition, all the evidence offered in this case by the caveators, except that as to handwriting, was specifically offered and admitted, over objection and exception, in support of both issues, and specifically submitted by the court to the jury in the aggregate, over objection and exception, for that purpose.

At the conclusion of the trial counsel for the caveators saw the preposterous consequence which must result if the jury believed all of their evidence, and under the instructions of the court applied it to the two issues and found a verdict in their favor upon both. They therefore requested the court to instruct the jury that if they should find in their favor upon the issue as to forgery, they should answer the issue as to revocation, "No," and add to that verdict, contrary to the practice, the reason for such finding, to wit, "Because he never executed it." In other words, they demanded that their evidence should be received and considered by the jury in support of the fourth issue, and though sufficient to sustain a verdict in their behalf upon that issue, that the jury should not render such verdict, but should render a verdict contrary to their own evidence.

It will doubtless be contended here, as it was below, that the issue of revocation having been found by the jury against the caveators, the questions relating to that issue are not open for consideration by this court.

It is submitted, however, that, notwithstanding the verdict rendered, the questions arising upon that issue are still open to consideration and important for decision.

As all the evidence was admitted upon both issues, it is material to inquire whether it was admissible upon either, because, if admissible upon neither, its admission was unquestionably reversible error, without reference to its application.

Moreover, if a new trial should be awarded this court is

called upon to determine whether the verdict upon that issue, even in the form as rendered, is not conclusive against the caveators, and if not, whether the evidence admitted could properly be received in support of the issue on such new trial

It is also to be remembered that this proceeding was prior to the act of June 8, 1898 (30 Stat. 434) conferring jurisdiction upon the court to take probate of wills of real estate and that whether a new trial of this case be granted or not, the same question must arise upon the offer of this paper as a will of real estate.

This Case, though Extraordinary in its Circumstances, is not Unprecedented, and is Subject to the Ordinary Rules of Law Applicable to Will Contests.

The circumstances attending the production of the paper in controversy in the proceedings are peculiar and unusual and to some extent mysterious, were a source of embarassment to the courts below as well as to counsel, and seem to have led the courts to the conclusion that the case was, for that reason, not within the general principles of the law applicable to other cases where the production of the will is unaccompanied by any peculiar and unusual circumstances.

It is, however, a matter of common knowledge that testamentary papers not infrequently appear in the most unexpected places. For example, testamentary papers have been found concealed in a bedstead (Castle *vs.* Torre, 2 Moore P. C., 133–160); in the lining of a trunk (State *vs.* Ames, 23 La. Ann. 69); in a barrel of waste paper (Lawyer *vs.* Smith, 8 Mich. 411); many years after testator's death in in the repositories of a deceased devisee, holding under another will of the same testator (Andrews *vs.* Motley, 12 C. B. N. S. 514); in the custody of a servant who had rescued it from a waste basket (Cheese *vs.* Lovejoy, 2 L. R. Prob. Div. [1877] 251); etc., etc.

Notwithstanding the ability and industry of the judge who tried the case and the court who heard it on appeal, and the fidelity, learning and conscientious application of

counsel on both sides who conducted the proceedings below, no case similar in its facts to the case at bar was discovered, and the courts, both at the trial and on appeal, proceeded on the theory that none such existed, and that, as stated by the trial court, the situation was unique (Rec., p. 33). Indeed, counsel for defendants in error in their brief in the Court of Appeals said:

> "This case is unique. The cases referred to in the argument on either side, and the books of precedents generally will be searched in vain for its parallel. . . . But this is the only case on record in which the disputed document has come from an unknown source, under such circumstances as plainly to indicate that he who sent it was determined that his identity should never be discovered, and in which all the subscribing witnesses were dead when the paper made its appearance, and no person appeared to testify either to the execution of the paper or to its ever having been seen from the day of its apparent date until it made its mysterious appearance."

This statement was apparently justified under the circumstances. Continued research, however, has shown that this case is not unprecedented, and resulted in the discovery of no less than four cases in which testamentary papers, sent anonymously through the mail, as was the paper in controversy, have been offered for probate and passed upon judicially.

It is a common expression that "no will case has a brother," the correctness of which is proved by the exception occurring here, for not only has the case at bar a brother, but it may be said a twin brother, in the case of—

> Hitchings *vs.* Wood, 2 Moore P. C. C. 355–448, (1841); also reported in 1 Notes of Cases in Eccl. & Marit. Cts. 144–160 (1843).

The case arose upon the propounding for probate of three written instruments, two of them together purporting to be the will, of James Wood, of the city of Gloucester, and the

third a codicil thereto. The testator died April 20, 1836, at the age of eighty years, a bachelor and without near relations, leaving personal property to the amount of about £800,000, and real estate to the value of £98,000.

An appeal to the Privy Council on a preliminary question of practice was taken and heard in June, 1838 (2 Moore P. C. C. 410), and the case remanded for hearing on the merits. The hearing on the merits took place before Sir Herbert Jenner, holding the Prerogative Court of Canterbury, in December, 1838, the argument occupying eight days and being conducted by such eminent counsel as the Queen's Advocate (Sir John Dodson), Drs. Addams, Phillimore, Haggard, Burnaby, Jenner and Curteis. Sir Herbert Jenner in February, 1839, denied probate to all three instruments, rendering an opinion covering over a hundred pages of the report. (Wood *vs.* Goodlake, 2 Curteis Eccl. Reps. 82–209; also reported in Monthly Law Magazine and Political Review, April, 1839, pp. 155–189).

An appeal was taken from this judgment to the Privy Council, and was heard by Lord Lyndhurst, Lord Langdale (Master of the Rolls), Vice-Chancellor Sir Launcelot Shadwell, Baron Parke, and Sir James Littledale, the argument occupying thirteen days in April and May, 1841. Sir John Campbell, Mr. Pemberton, Mr. Austin, Mr. Butt, Sir Thomas Wilde, Sir William Follett, Mr. Peacock, Sir Frederick Pollock, Serjeant Bompas, and Mr. Wigram, together with the counsel (except Sir John Dodson), who appeared below, conducted the proceedings before this tribunal. Lord Lyndhurst in August of the same year delivered the unanimous opinion of the Privy Council, reversing the court below and directing that all the papers be admitted to probate,*

* After the decision in the Privy Council the Corporation of Gloucester filed a bill to compel the payment of legacies amounting to £200,000 under the codicil. The bill was dismissed on the ground that the trusts indicated did not sufficiently appear. Corp. of Gloucester v. Wood, 3 Hare, 131 (1843).

Affirmed by the House of Lords, Corp. of Gloucester v. Osborn, 1 H. of Lds. Cas. 272 (1847.)

saying, at the outset of his opinion (2 Moore P. C. 430):

> "The extent of the property in controversy, the obscurity of some of the circumstances, and the extraordinary and mysterious nature of others, have given to this proceeding much interest, and have led to very full and able arguments at the bar, which have been attentively listened to and considered by the court, and with the more anxiety and care on account of the high character of the very able and learned judge whose decision we have been called upon to review."

In the following statement of the facts of this remarkable case frequent reference will necessarily be made to Sir Herbert Jenner's opinion, which in some instances treats them more fully than does the reporter in his excellent statement preceding Lord Lyndhurst's opinion.

The papers involved in these proceedings are respectively referred to in the opinions as papers A, B and C.

Paper A was dated December 2, 1834, and was headed "Instructions for the will of me, James Wood," etc. It appointed Alderman Wood, of London, and John Chadborn, Jacob Osborne, and John S. Surman, of Gloucester, executors, and desired them to take possession of and retain to themselves all testator's personal estate, subject to his debts and "such legacies as I may hereafter direct," and states that he will dispose of his real estate to such persons, and in such parts, as he may, by writing endorsed on said paper, direct. This paper was signed, but not witnessed.

Paper B commences, "I, James Wood, Esq., do declare this to be my will for disposing my estates as directed by my instructions," and declares the wish that his executors (without, however, naming them) shall take his whole estate, both real and personal, subject to his debts, and any legacies, etc., which he might thereafter make. It is dated the 3d of December, 1834—the day after the instructions—is

signed by the testator, and bears an attestation clause, and the signatures of three witnesses.

These papers, both in the handwriting of Chadborn, testator's legal adviser, were written on separate sheets of foolscap, and, when produced, were wafered together book-wise, and enclosed in an envelope with an endorsement designating its contents. (2 Moore P. C. C. 356–358). They were alleged to have been found by one Phillpotts, a friend of the deceased, in this condition, with the seal on the envelope unbroken, on the day after the testator's death, in his repositories, and the executors swore to having no knowledge of any other testamentary papers of the deceased.

Proceedings were at once instituted to establish these papers as the will of the deceased and application was made for probate in common form, but probate was stopped by caveats being entered by two persons alleging themselves to be next of kin. Thereupon, one Mrs. Goodlake appeared alleging herself to be the next of kin of the deceased, the executors at once admitted her interest, and, the other two parties having withdrawn (Id., p. 360), it was then decided to "propound the will and prove it by witnesses in solemn form of law" (2 Curt. 109—See 2 Moore, P. C. C. 361). There were, therefore, at that time but two parties before the court, the executors, and, as their opponent, Mrs. Goodlake. The allegation propounding the papers A and B for probate was brought in on June 4, 1836, and they must have been admitted to probate in due course as stated by Sir Herbert Jenner (pp. 113, 119, 122–123), but for the happening of a most extraordinary event.

Four days later, on the 8th of June one—

> "Thomas Helps received by the three-penny post a sealed paper or packet contained in an envelope, which was directed to 'Thomas Helps, Esq., Balham Hill, near London,' and, in the corner, written 'Important.' It was stamped, 'Strand, 2 A 2 Ju 8,' indicating that it had been put in at an office in the Strand on that day" (2 Moore P. C. C. 360).

This envelope contained two papers; first, the one known as paper C, which is as follows (2 Curt. 173; 2 Moore P. C. C. 360):

> "In a codicil to my will, I gave to the Corporation of Gloucester 140,000*l.* In this I wish my executors would give 60,000*l.* more to them, for the same purpose—as I—have before named. I wod also give to my friends, Mr. Phillpotts, 50,000*l.*, and Mr. Geo. Council, 10,000*l.*; and to Mr. Thomas Helps, Cheapside, London, 30,000*l.*; and Mrs. Elizabeth Goodlake, mother of Mr. Surman, and to Mr. Tho. Wood, Smith-street, Chelsea ("each" interlined) 20,000*l.*; and Sam Wood, Cleveland-street, Mile End, 14,000*l.*; and the latter Gentn Family, 6,000*l.*; and I confirm all other bequests, and give the rest of my property to the Execs, for their own interest.
>
> "JAMES WOOD.'
>
> "Gloucester City Old Bank,
> "July, 1835."

This paper—

> "appeared at the time when it was brought into the Court to have been mutilated to a certain extent; that is, it was burnt at one corner, and torn in one or two places, though not quite through the paper, one tear going through and dividing the Christian name from the surname of the deceased." (2 Curt. 96).

The other paper was a slip upon which was written in pencil (2 Curt. 114; 2 Moore P.C.C. 361):

> "The enclosed is a paper saved out of many burnt by parties I could hang. They pretend it is not J. Wood's hand; many will swear to it. They want to swindle me. Let the rest know."

Immediately upon receiving these papers, Helps communicated their contents to the executors, and, on the 13th of June, they were deposited in the registry of the court. Advertisements were inserted in the papers offering a reward of ten thousand pounds for the production of the codicil re-

ferred to by that contained in the envelope, and also for the writer of the penciled note enclosed with this paper, but neither the one nor the other was ever discovered.

On the same day the executors wrote to the Mayor of Gloucester, notifying him of the appearance of this paper, and, five days later, they again wrote him on the same subject, making no objection to the genuineness of this paper, and acting upon it in this, as well as in their search for another codicil, as a genuine instrument (2 Moore P. C. C. 443).

The codicil was in due time propounded for probate by the legatees (2 Curt. 114; 2 Moore P. C. C. 361, 365), and in the course of the subsequent proceedings several most extraordinary and unexpected facts were discovered. It was shown that when testator was taken with his fatal illness, the executors, Osborne and Surman—the former a clerk and the latter an apprentice, both residing with the testator—summoned the other two executors from London, so that all four were present in the house on the morning of the day upon which the testator died, his death occurring about 11 o'clock at night. On that morning Chadborn took from a desk in his own house the paper A, carried it to the testator's house and procured the paper B from Osborne who removed it from testator's private repositories, to which he had access. Thereupon Chadborn, in the presence of the other executors, attached A and B together in the manner already described, placed them in an envelope, which he had already at his own house endorsed, "The will of James Wood, Esq., 2nd and 3rd Dec., 1834," sealed this envelope with testator's seal and it was then placed among testator's effects where the next day Phillpotts discovered it (2 Curt., 125).

Upon testator's death the executors took full possession of his effects and searched through them, finding, as they alleged, no testamentary papers other than the two propounded. They admitted that certain cancelled notes of the bank, old letters, bills and "other useless papers, such as

old lottery hand-bills, or the like, all equally valueless and insignificant," had been burnt (2 Moore P. C. C. 383, 384), and that Chadborn had burned a deed (2 Curt. 153) and a "memorandum to the effect that he (Mr. Chadborn) was to take possession of his [testator's] deeds and manage his concerns after his death" (Id., 202), but denied having burnt anything of a testamentary nature. The evidence as to this of necessity depended upon the executors alone, for they kept the testator's servants, the only persons in the house at the time of testator's death, and thereafter, under their control, refusing the legatees access to them, except in the presence of their agents (Id. 178, 205). It was also shown that Chadborn visited testator's house alone early on the morning after testator's death, before Surman and Osborne were up, but for what purpose he did not disclose.

Much testimony as to handwriting was introduced and in considering it the court calls attention to the fact that the executors had facsimile copies made of the codicil, which were exhibited to witnesses before their examination in court, and upon which many of them based their opinions that the paper was a forgery. The court severely censures such a proceeding, pointing out that an opinion based on the view of a copy, which cannot of necessity be identical with the original, cannot be perfectly fair and unbiased (2 Curt. 181–188). Great stress was laid upon the fact that the amounts of the legacies in the codicil were expressed in figures when it was shown the testator's custom in writing was to express amounts in words; that he usually formed some letters in a different way from that in which they appeared in the codicil; and that the name of one of the legatees was incorrectly spelled (2 Moore P. C. C. 444). Attention was also called to the fact "that there were greater spaces left for certain words" in this paper "than those words would naturally occupy," and it was argued that "therefore blanks were left for certain words to be inserted" (2 Curt. 186).

No question was raised as to the capacity of the testator

to make a will at any time, nor was there any claim of undue influence (2 Moore P. C. C. 431).

The questions presented to the court for decision upon the propounding of the papers A and B were, as stated by Lord Lyndhurst (2 Moore P. C. C. 431), "confined to the construction of the papers" and "to the circumstances connected with these instruments" (See also 2 Curt. 128).

The effect of these two papers together was to give to the four executors named in paper A the whole of testator's immense estate, and it does not appear that there was any contention that they were invalid in any respect (2 Moore P. C. C. 417), the sole questions being, was the evidence of execution sufficient under the practice of the Ecclesiastical Courts, and, if so, was A sufficiently referred to in B to make the former a part of the latter? Both courts held the evidence of execution to be sufficient, the main question on this branch of the case therefore arising on the connection of the two papers—in other words, upon the explanation of the ambiguity of B referring to "instructions" and "executors" without further particularization. A great mass of testimony was considered in this connection, divided by Sir Herbert Jenner into two classes, that showing a probability of such a disposition as was made by the two taken together, and that showing a recognition of such disposition (2 Curt. 142). This testimony consisted largely of declarations of the testator, most of which were considered as to whether or no they "recognized" the disposition made under the construction of the papers contended for (2 Curt. 143, 144, 147, 148, 151, 153, 159, 160, 163, 164, 166 and 167). The Privy Counsel also considered them in this light and in this light only, as is demonstrated by the following remarks of Lord Lyndhurst:

> "In considering the evidence of recognition, I pass over the many loose declarations made at different times in general conversation. We place no reliance upon them" (2 Moore P. C. C. 437).

. . . . . .

> "But the most important recognitions are those which are proved by *Sutton* and *Stevens*, and to which it will be proper more particularly to advert. The first shows a motive for making a will, appointing executors, arising before the 1st of *December*, namely, the opinion of the customers as to the necessity of providing for the payment of their accounts" (p. 438).
>
> . . . . . .
>
> "It was not a loose and careless conversation, but, on the contrary, a very distinct recognition, very deliberately made, in the course of business, and is strongly confirmatory of the case of the appellants." (p. 441).

Sir Herbert Jenner rejected A on the ground that it was not sufficiently identified by B, and that the parol evidence did not show that the testator recognized the two papers as forming together one testamentary act. He did not pass upon B standing alone for the reason that there was no one before the court qualified to propound it by itself (2 Curt. 169).

The Privy Council directed that both papers be admitted to probate, Lord Lyndhurst saying (2 Moore P. C. 442):

> "The result then is this, we are of opinion that the paper A entitled 'Instructions,' was signed by the testator, and on the day it bears date. That in the paper B, the testator referred to these instructions, and to the persons whom he had therein named as his executors. That in addition to the proof of handwriting, there is sufficient confirmatory evidence to satisfy us that the paper A was the act of the testator, and that he meant, in mentioning his executors in the paper B, the executors whom he had previously named or appointed in the paper A."

The codicil (C), which operated to divest the executors of £350,000, or £210,000 (according to its construction) of the estate left to them by A and B, was bitterly contested on the grounds (1) that it was a forgery (2 Curt. 131, 201; 2 Moore P. C. 444) and (2) that it was revoked (2 Curt. 114, 201;

2 Moore P. C. C. 447). Sir Herbert Jenner rejected it, though satisfied of its genuineness on the score of handwriting, on the ground that the adminicular proof required by the rules of the Ecclessiastical Courts was insufficient to entitle it to probate, saying (2 Curt. 206):

> "Now, looking at all the circumstances of the case, *though the evidence in affirmance of the genuineness of the paper, as far as handwriting is concerned, is extremely strong; so strong, that if I were bound to pronounce whether it was or was not the handwriting of the deceased, I should have little hesitation in saying that I believed it to be his handwriting; yet it is impossible for the court to pronounce a judicial opinion upon that ground alone.* I am also of opinion in favor of the probability of the disposition contained in the paper; *but probability, coupled with the evidence of handwriting is not sufficient* to enable the court to pronounce judicially that the paper is proved to be the act of the deceased. I, therefore, pronounce also against the validity of the paper of July, 1835, which is propounded by the legatees as a codicil."

The Privy Council, however, directed that this instrument also be admitted to probate, taking the same view of the strength of the proof of handwriting as that taken by the court below, but holding the adminicular proof sufficient to satisfy the peculiar requirements of the Ecclesiastical Courts. While Lord Lyndhurst considers some of the parol testimony in this connection, most of the confirmatory proof considered by him is derived from the paper itself, as appears from his opinion on this branch of the case, which is as follows (2 Moore P. C. C. 443–447):

> "Then as to the codicil, we think it is (both the body of the instrument and the signature) in the handwriting of the testator. The evidence in the affirmative so greatly outweighs that which is opposed to it, as to satisfy us upon this point. The evidence has been [so] thoroughly sifted both at the bar and by the learned judge, as to render any further

examination of it unnecessary. It derives further strength and confirmation from the conduct of the executors; they were intimately acquainted with the handwriting of the testator, and with everything relating to him. They saw the codicil, and expressed no doubt of its genuineness. It is true that the letter of the 13th of June, to the Mayor of Gloucester, was written before they had seen the original, but they afterwards saw and examined it long before the post left London on that day. They made no objection, and in their subsequent letter, and in the search for another codicil, they acted upon it as if it were a genuine instrument. It was not till some time afterwards that they altered their course, and contradicted is as a forgery.

"But according to the rule of practice to which I have before adverted, the Ecclesiastical Court will not grant probate on the sole evidence of the handwriting of a testator where that is disputed. There must be some confirmatory proof; this confirmatory proof must evidently vary with each particular case, and would require to be more or less stringent according to the weakness or strength of the evidence as to the handwriting. In some of the cases referred to in the arguments at the bar, the confirmatory proof appears to have been very slight; we think, however, that there are in this case, in addition to the very strong evidence of handwriting, several circumstances leaving in the result no doubt on our minds that the codicil was the act of the testator.

"It is evident that he had it in contemplation to make a codicil or codicils to his will. This appears as well from the will itself as from the question put by him to Chadborn at the time of executing it. It is not indeed probable that he would have left so very large a property to be enjoyed solely by his executors.

"There is nothing in the dispositions which it contains to lead us to doubt the genuineness of the instrument: and if it does not notice every person who might naturally have been an object of his bounty, this may be explained by the circumstance of there

having been a previous codicil, to which this instrument refers.

"Several facts insisted upon to show that the paper was a forgery, tend strongly, upon investigation, to prove that it is the act of the testator: as an instance, I refer to the incorrectness respecting the name of Counsel. It is not probable that a person forging such an instrument would have misspelt it, particularly a person who must, from the nature of the dispositions, obviously have been well acquainted with the testator and his connections; so as to the use of figures instead of words, in stating the sums bequeathed to the legatees. A forger would have conformed to the usual practice of the testator; again, stress was laid upon the peculiar manner in which the *x* was formed in the word executors. It is a mere cross, whereas his usual practice was to make an *s* and then to cross that letter. But on a careful search, instances have been found among the books and papers of the testator, and which were, as the learned judge observes, very reluctantly produced, of similar deviations from his usual practice, and also of the same inaccuracy in spelling the name of Counsel. These are singular and striking coincidences, and there are others of a similar nature, strongly confirmatory of the evidence of the handwriting. It is true that these are minute circumstances but their very minuteness, we think, adds to their importance, and affords the strongest internal evidence of the genuineness of the instrument.

"It has been observed, and we think justly, that it is not at all probable that a person forging such an instrument would have referred to a former codicil, and thereby unnecessarily increased the means of detection. The very amount too of the legacies, and above all, the charges against the executors, would almost of necessity lead to opposition. Looking too at the different dispositions in the codicil, it is almost impossible to suppose that if the instrument had been a forgery, it would not have been detected by some inaccuracy, or exposed by some inconsistency.

"There are other circumstances of confirmation

which are not immaterial. It is proved that the testator had by a former will bequeathed a sum of £20,000 to the city of Gloucester. This was at a period when his circumstances were very different from what they were at the date of the codicil. He had in the interval received large accessions to his property. But unless the codicil be genuine, there is no bequest to to the City. In a conversation with Hopkins in February, 1836, after the date of the codicil, and in the presence of several persons whose names are given, the testator, in allusion to some suggestion made by the witnesses, stated that he had not forgotten 'old Gloucester' or 'poor old Gloucester.' And this corresponds with the evidence of Elizabeth Whalley, who states, that on a former occasion, he had said, 'He would do great things for old Gloucester.' It is stated, indeed, that he sometimes declared that the corporation should not be the better for him. But his declaration in favor of the City, and particularly that to Hopkins, made after the date of the codicil, agree with the documentary proof, and confirm it.

"Again, in the codicil there is a bequest to a relation, Samuel Wood, of £14,000, and to his family of £6,000. He had, in fact, six children. The six thousand and the fourteen make twenty thousand. He had given the same sum (£20,000) in each of the two preceding bequests, to two other relations, Mrs. Goodlake and Thomas Wood. Now it appears, that in a conversation with Samuel Wood, the testator had asked him how many children he had, and the form of that bequest appears to be the result of that conversation, and corresponds with it.

"These circumstances, more or less weighty, and in particular the internal evidence to which I have referred, are in confirmation of the codicil, and, added to what we consider the all but conclusive evidence as to the handwriting of this holograph instrument, satisfy us that the codicil was the act of the testator.

"But then it comes, nobody knows from whence, or from whom. It was sent anonymously to one of the parties claiming under it. This is a circumstance justly calculated to create suspicion, and would, under

ordinary circumstances, have been a most material and formidable objection. But the evidence of this case leads to the conclusion, that the papers of the testator have been improperly dealt with. It is proved, as we think satisfactorily, that Chadborn, who had committed or attempted, a fraud, in the annexation of the papers A and B, was in the house of the testator at an early hour of the day after the death, while Osborne and Surman were still in bed. The explanation is insufficient, and at variance with the proof. It is admitted that papers were burnt; and one of them probably of a testamentary character. These circumstances appear to us greatly to weaken the force of the objection.

"Adverting here again to the charges against the executors, would a person forging such an instrument have made such a charge? On what grounds? It was not known at the time when the codicil was produced, that papers had been burnt; that there had been anything irregular in the conduct of the parties. They were respectable in station and character; but the misconduct and burning are charged, and it turns out most unexpectedly to be true. The person, therefore, who produced this paper, must have had some knowledge of these transactions—some connection with them; and this explains the possession of the codicil, and shows why it was not produced from the repositories of the testator."

In the view of the case taken by Sir Herbert Jenner, he having rejected the codicil for want of sufficient adminicular proof, according to the requirements of the Ecclesiastical Courts, it became unnessary to pass upon the other question, that of revocation. With reference to the condition of the codicil and the contention based thereon, he says, however, (2 Curt. 114):

"The paper accompanying this writing is sworn to have been received in the same state as it is now before the court, that is, torn, but not entirely through, but a part of the corner of the paper is burnt; and

it has been argued from these circumstances, that, whether the paper be or be not a codicil, whether it be in the deceased's handwriting or not, and whether subscribed by him or not, are points wholly unimportant, because it is a cancelled document; and that objection was stated at the time when the allegation propounding the paper was debated; but the court was of opinion that the cancellation was not so clear as to prevent the parties from being permitted to propound the paper, more particularly as it is represented in the anonymous letter to have been saved out of many burnt by parties the writer could hang; and, therefore, if such were the case, it is evident that they could not have been destroyed by the deceased, but by some other persons who had an interest in destroying this paper."

(Id. p. 174):

"The paper itself was produced in a very mysterious manner. It was sent through the three-penny post to Mr. Helps, and communicated to the executors at the earliest period. And although very large rewards have been offered, the writer and transmitter of the letter has not thought proper to come forward. The case, therefore, labors under a burden, which it is difficult to remove, of having no person to give any account of its execution by the deceased. The letter which accompanies the paper contains undoubtedly a charge against some person or other of a most atrocious character, namely, an attempt to burn the paper, along with others. Who are the persons alluded to in this letter the court has no means of exactly ascertaining; but from the nature of the plea given in, it is impossible not to see that the executors, or some or one of them, or some person or persons connected with them, and acting under their directions, are supposed to have some knowledge, at least, of the alleged destruction, if not themselves the immediate agents. The court will not stop to inquire whether or not it is in a cancelled state; or if it be so, whether it was the act of the testator himself; because there is no clue to this fact, and the court must be satisfied, in the first

place, that the paper was ever executed by him; and secondly, if it was so executed, how it was obtained from his possession, and treated so as to give it the appearance it now presents."

The Privy Council, having held that the requirements of the Ecclesiastical Court as to adminicular proof were fulfilled, was of necessity required to decide the question of revocation, and held that there was no evidence in support of that contention, Lord Lyndhurst saying (2 Moore P. C. 447):

"Then, as to the alleged cancellation, we think, if this be a genuine instrument, that the onus to make out the fact of the cancellation is on those who oppose the codicil. It seems that a corner had been burnt, the paper torn through, and in one place across the signature; but by whom and under what circumstances does not appear. There is nothing whatever to show that it was done by the testator, or if so, with what intention it was done. If it be a genuine instrument it proves that there was also another codicil, and which is not forthcoming. It is obvious, we think, that it must have been improperly dealt with, for if it was defaced by the testator he would either have entirely destroyed it or it would have been found in this state among his papers. The circumstance of its being in other hands shows that a fraud had been practiced, and that no safe conclusion can be drawn from its appearance that it was burnt or torn by the testator. But even if it had been found among the testator's papers at the time of his death we incline to think some further evidence beyond its present appearance would be necessary to show that he intended to cancel it. Our opinion, therefore, is that the codicil ought to be proved."

The three other cases previously referred to, in which testamentary papers had been sent anonymously through the mails, were all decided before Hitchings *vs.* Wood. The first in date is Crisp & Ryder *vs.* Walpole, 2 Haggard's Eccl.

Reps. 531 (1829). In that case the testator died in November, 1826, and in the same year his will, dated December, 1822, and nine codicils thereto, was admitted to probate. In 1828 Ryder received through the two-penny post an envelope, addressed to him, which contained what purported to be a holographic codicil, executed by the testator in 1823, Ryder, together with several others, being named in this codicil as a legatee.

Sir John Nicholl refused to grant probate of this instrument, there being no adminicular proof, as required in that court, in support of the proof of handwriting, saying (p. 535):

> "It is a rule of this court that evidence of handwriting alone is not sufficient to establish a testamentary paper without something to connect the act with the deceased."

The second case is Rutherford *vs.* Maule, 4 Haggard Eccl. R., 213 (1832), which was a contest over the estate of Frances Mary Shard, who died in May, 1819, a widow sixty years of age. The following year, in April, administration upon her estate, amounting to about £24,000, was granted for the benefit of the Crown, no next of kin having been discovered nor any will propounded. Four memorials, properly supported, were addressed to the Crown setting forth that the deceased had left no will and no relations, and that it had been her intention to divide her property among the individuals named in these memorials, and in December, 1823, the Crown made certain grants in accordance with these memorials, taking security for their repayment. In February, 1820, one Charles Shard, a nephew of the husband of the deceased, had received through the mail an anonymous letter addressed to him, covering a paper purporting to be a holographic will of the deceased, in which he, together with two others, was named as executor, the said paper bearing date in 1819, one month before the death of the alleged testatrix. This paper was not offered for probate, though it was exhibited by Shard

to some of the parties named therein, and was retained by him until June, 1820, when, together with all other papers of the deceased, he turned it over to the administrator representing the interests of the Crown. The parties named in the will were substantially the same as those on whose behalf the memorials before referred to were presented.

After the grants were made as above stated there were no further proceedings with reference to this estate until in 1830, when one Rutherford called in the administration, alleging himself to be the next of kin of the deceased. In the middle of the following year the Crown's proctor in looking over the deceased's papers discovered the holographic will and letter accompanying it, received ten years previously by Shard, and notified the parties interested of the discovery. Then, for the first time, the executors thought proper to set up the paper and it was accordingly propounded.

Sir John Nicholl refused probate of this paper, calling attention to the fact that in 1820 the parties interested under it had no interest in propounding it for the reason that they expected to get grants, which they ultimately received, and that they then treated it as a forgery, but, upon the appearance of one alleging himself to be next of kin, it for the first time became to their interest to have this paper established, as they might then be compelled to relinquish the grants, and they then changed front and propounded the will as genuine (p. 223). He holds the evidence of handwriting to be unsatisfactory, attaches no importance to the evidence tending to show a probability of such dispositions as were made by the paper in controversy, and expresses himself as satisfied that the testatrix had neither the ability nor opportunity to make the will on the day it bore date.

The last of these cases is Bussell *vs.* Marriott, 1 Curteis, 9 (1835).

The testator, Pettiward, died in November, 1833, leaving

a will executed in May, 1832, and a codicil executed in June, 1833, both of which were undisputed. In January, 1834, however, one Robert Marriott received a letter bearing the London post-mark to the following effect (p. 11):

> "Inclosed is a paper left (with the strictest injunctions to secrecy) by the late Rev. D. Pettiward, nearly the last time he was in London, with directions to be sent by post after he should have been dead a month at least." "London: January, 1834."

Enclosed with this letter was a piece of paper on which was a note purporting to have been written by the deceased addressed to Robert Marriott, and also the disputed codicil, by which the deceased released said Marriott from the debts owed by him, and named him his executor. It appears elsewhere that this operated as a legacy of about £6,000. This codicil purported to be in the handwriting of the testator and signed by him, but was not witnessed.

Sir Herbert Jenner rejected this paper on the ground that the adminicular proof required by the Ecclesiastical Courts, taken in connection with the proof of handwriting, was insufficient to entitle the instrument to probate. In the course of his opinion he says (p. 13):

> "Now the factum of the codicil depends entirely upon the evidence of handwriting, which it is admitted is not alone sufficient to enable the court to pronounce for any testamentary paper, but there must be some circumstances adminicular to that evidence tending to connect the paper with the alleged testator, the requisite stringency of those circumstances varying according to the strength of the evidence as to handwriting; but still it is admitted that evidence of handwriting, done however strong, is not sufficient proof of the factum of the instrument."

And again (p. 22):

> "Considering then the rule, as indeed has been fully admitted, to be clearly established; that evidence of handwriting is not sufficient to establish a

testamentary instrument, but that there must be something to connect it with the deceased; and admitting the preponderance of the evidence as to handwriting to be in favor of the genuineness of the paper; it would seem to be a waste of time to enter into a minute consideration of it; the court will therefore proceed to consider whether the circumstances which are stated to connect the paper with the deceased are sufficient to produce that result."

And concludes (p. 32):

"Upon the whole, then, of this case, I am decidedly of opinion that there are no circumstances of probability, nor declarations, nor facts, to connect this instrument with the deceased; and although the preponderance of evidence upon the abstract question of handwriting may be in favor of the party propounding it, yet it is by no means conclusive even upon that point; and taking all the circumstances into consideration, I feel myself bound to pronounce that the parties have failed in proving this instrument to be the genuine act of the testator, and I therefore pronounce against it."

Notwithstanding the extraordinary feature of the anonymous appearance through the mail of the testamentary papers involved in these four cases, the courts did not in a single instance vary from the established rules of evidence or procedure in force in the Ecclesiastical Courts and applicable alike to all wills, no matter how or whence produced. Thus in Rutherford *vs.* Maule the court sitting as judge both of the law and the facts rejected the paper because satisfied that the weight of evidence was against its validity, the proof being in every way insufficient and it being shown in addition that the testatrix could not have executed the paper at the time it bore date.

In Crisp and Ryder *vs.* Walpole, and Bussell *vs.* Marriott, as well as in Wood *vs.* Goodlake (in the Prerogative Court), the papers propounded were rejected solely because the

proof in support of them was held to be insufficient to meet the peremptory rule of the Ecclesiastical Courts requiring in addition to proof of handwriting, no matter how strong, adminicular or corroborative proof as a condition precedent to probate. The quotations (*supra*, pp. 42, 50, 52, 53) from Sir Herbert Jenner and Sir John Nicholl in these cases are pointed and clearly indicate the difference between the requirements of the Ecclesiastical Courts and the Courts of Common Law in this respect, and Lord Lyndhurst recognizes it when he says (2 Moore P. C. C. 436):

> "According to the rule of the Ecclesiastical Court in granting probate, proof of the handwriting alone of the alleged testator would not, in such a case, be sufficient. There must be further adminicular or corroborative evidence."

Speaking of this subject, Taylor, in his work on Evidence (9th Ed., Chamberlayne's Am. Notes, 1897), says (Sec. 966):

> "Again, in Ecclesiastical Courts, the testimony of a single witness, though *omni exceptione major*, is insufficient to support a decree, when such testimony stands unsupported by what the civilians pedantically call 'adminicular circumstances.' This doctrine is now of little practical importance, as the spiritual courts have, by a series of legislative improvements, been shorn of most of their jurisdiction over the laity, though they still possess it over the clergy."

Doctor Ayliffe, a recognized authority on the Cannon Law, whose statement in this regard is approved by Sir Herbert Jenner Fust, in Evans *vs.* Evans, 1 Robertson Eccl. Rep., 171 et seq., speaking of the arbitrary rules of evidence applied by the Ecclesiastical Courts (Parergon Juris Canonici Anglicani, 2nd Ed. Lond. 1734, pp. 444–446), says:

> "Now that is called full proof which gives so great an assurance to the judge that he seems to himself to be fully instructed in the merits of the cause. And this kind of proof is made by two or three witnesses,

> at the least. For there are some matters which, according to the Cannon Law, do require five, seven, or more witnesses to make full proof; yet full proof can not be said to be made by one witness alone. . . . A half proof is that which does not make full proof; and of this kind we may reckon the testimony of one witness, fame, private writings, and the like. . . .
>
> "According to the Civil and Cannon Law, proofs are arbitrary, and depend on the mere discretion of the judge; for the judge may *ex animi sui motu* give credit to witnesses, though their depositions be not clear."

From the above it is apparent that had any one of these three cases been in a court of probate in this jurisdiction, governed as it is in matters of evidence by the rules of the common law, the respective papers must, *on the proof of handwriting alone*, have been admitted to probate.

It is to be noticed that both Crisp & Ryder *vs.* Walpole, and Bussell *vs.* Marriott were decided before the questions arising upon a similar state of facts were presented to the Privy Council in Hitchings *vs.* Wood, and that in the lower court, in the last mentioned case, Sir Herbert Jenner takes the same view of the questions presented as was taken in Crisp & Ryder *vs.* Walpole, and Bussell *vs.* Marriott. When, however, this state of facts was presented to the Privy Council, the court of last resort, in a case involving four and one-half millions of dollars, one million six hundred and fifty thousand of which purported to be disposed of by the paper so mysteriously produced, that tribunal did not hesitate to admit the instrument to probate, and, though adhering to this rule of evidence as to adminicular proof peculiar to the Ecclesiastical Courts, intimated that the court below, under the influence of the peculiar and mysterious circumstances of the case, had carried this rule too far.

That the condition of the paper in controversy in the case at bar and the circumstances of its appearance excited the suspicions of the trial justice in the court below, and, in the

absence of any precedent based upon similar circumstances being known to him or brought to his attention, unduly influenced his mind, is apparent from his observations in his charge to the jury, where he says (Rec., pp. 128–129):

> "If this will had been found . . . among the papers of Joseph Holt, that circumstance would lend to the instrument a presumption of genuineness. If it had been enlightened by the testimony of any one of these subscribing witnesses, probably this question would not have been put before you for determination."
>
> . . . . . .
>
> "If we were enlightened in this case as to the source from which this paper emanated just before it reached the office of the register of wills, doubtless it would throw a great deal of light upon this question."
>
> . . . . . .
>
> "The difficulty is that this paper was deposited in the mail by some person who, for some fraudulent purpose of his own, deems it necessary to be quiet, or who is so recreant to duty that he does not come forward to indicate the fact that it was so deposited."

The legatees under this will were certainly not, as matter of law, its natural custodians, called upon to explain the source from which it came, while as matter of common experience they would be the last to know of its existence. The claim that it was not in the custody of the testator at the time of his death in a condition of perfect integrity depends exclusively upon the testimony of the two caveators interested in its destruction, who alone secured possession of all Judge Holt's papers immediately after his death, and who occupied themselves in the secret examination and the unlawful destruction by burning of such of them as they chose to suppress.

"*In odium spoliatoris, omnia præsumuntur.*"

By the ruling of the Privy Council in the case of Hitch-

ings *vs.* Wood, above cited, it appears that the genuineness of the paper in that case being sufficiently established, the burden was cast upon the opponents of the will to prove its revocation, and that that burden could not be discharged by mere suspicions growing out of the condition of the paper and its anonymous appearance through the mail, especially when it appeared that those interested in its destruction had an opportunity to destroy it and actually availed themselves of that opportunity by destroying some papers.

THE ISSUE OF REVOCATION.

The First, Second, Third, Fourth and Fifth Assignments of Errors.

The errors assigned as to the issue of revocation cover the exceptions taken to the admission of evidence and the instructions to the jury given and refused with respect to that issue.

While a large mass of wholly incompetent testimony was admitted in evidence to prove revocation of the will in controversy, it will be found upon examination that there was no competent evidence whatever offered upon that subject and that the prayers of the caveatees, in legal effect requesting the court to instruct the jury peremptorily to find a verdict in their favor upon that issue should have been granted.

In considering the questions arising upon the issue of revocation, it is necessary, as before explained, to assume the original genuineness and validity of the will in controversy. One can destroy the act of another but can revoke only his own act.

This revocation may be accomplished by acting directly upon the paper itself, by mutilation and the like, or it may be by an act extraneous to the will.

The several modes of revocation may be proved in various

ways, and before considering the questions raised by the errors assigned as to this issue, it is necessary to consider each of those modes in order to determine the questions presented.

There are but four modes of revocation known to the law in this District, namely—

1. By word of mouth only.
2. By a later inconsistent will.
3. By an express revocation in writing.
4. By burning, tearing, canceling, obliterating or other act of destruction or defacement with the intent to revoke.*

It will now be shown that no competent evidence was offered to establish revocation by any of these modes.

No Evidence of Revocation by Word of Mouth.

The Record in this case not only discloses no evidence tending to show a revocation by word of mouth, but no attempt was made to prove such.

The twenty-second section of the Statute of Frauds provides that:

> "No will in writing concerning any goods or chattels or personal estate shall be repealed, nor shall any clause, devise or bequest therein be altered or changed *by any words* or will *by word of mouth only*, except the same be, in the life of the testator committed to writing, and *after the writing thereof read unto the testator and allowed by him and proved to be so done by three witnesses at the least.*"
>
> Alex. Brit. Stat. 513.

It is to be observed that this statute not only forbids the revocation of a will by any parol will—"will by word of mouth only"—but, also, and separately, forbids the revocation "by any words." By its express terms, therefore, this

* Marriage and birth of issue would of course revoke, but as Judge Holt never remarried after 1860, and never had any issue, no question could arise under this head.

statute extends to and excludes every possible form of parol revocation.

No writing such as the statute requires was produced, no witness testified to having seen any such writing or to any such writing ever having had existence. Nor was it even attempted to be shown that Judge Holt ever in his life uttered a revocatory word as to this paper.

In this condition of the Record the first form of revocation is eliminated from consideration.

No Evidence of Revocation by a Later Inconsistent Will.

It is to be observed that this form of revocation arises by construction of law from the terms of the instrument, and it is essential to the establishment of the claim of revocation by this means that not only the fact of the execution of the later will be shown, but that its contents be placed before the court in order to the judicial construction of it as to whether revocatory or not.

No later will than the one in controversy was produced and it is submitted that no competent evidence was offered in the case to establish revocation by this means.

Some attempt was made to prove that Judge Holt had executed a will some time after February, 1873, but no such will was produced.

No witness pretended to have seen such a will or to have any knowledge that any such will had ever in fact existed.

The attempt to maintain this theory by alleged declarations of the testator was not permissible, and the evidence, even when thus erroneously admitted, was legally insufficient, and the question should not have been submitted to the jury.

In order to maintain the claim of revocation by a subsequent will it is essential—

1st. To prove by clear and satisfactory evidence the actual execution of a later will and its continuance in force to the

death of the testator, and that such will be inconsistent with the prior will.

2d. To produce such later will, or

3d. If such will cannot be produced, to establish by clear and satisfactory evidence its provisions to have been so far inconsistent with the former will that the two could not stand together.

See Thornton on Lost Wills (1890) 162.

In Nelson *vs.* McGiffert, 3 Barb. Chancery, 158 (1848), a will executed in 1832 was propounded. It was attempted to show that this will was revoked by a later lost will, the execution of which in 1837 was proved. As to the proof of a will not produced, relied on to revoke a prior will, duly proved, Walworth, Chancellor, says (p. 164):

> "The evidence of the witnesses on the part of the appellants in this case fully established the fact of the due execution of a testamentary paper by the decedent in 1837, but the appellants entirely failed in showing that it was a revocation of the will of July, 1832, or that it was inconsistent with that will in any respect. Neither of the witnesses says anything as to the contents of the testamentary paper of 1837, or that it contained any clause revoking the will of 1832, or any part thereof. A subsequent will does not revoke a former one, unless it contains a clause of revocation, or is inconsistent with it. And where it is inconsistent with the former will in some of its provisions merely, it is only a revocation *pro tanto*. (Brant *vs.* Wilson, 8 Cow. 56.) Where a subsequent will is made, and there is no proof that it contained any clause revoking a former will, as in cases where the contents of the last will cannot be ascertained, it is not a revocation of the former will."

In the case of Wallace *vs.* Wallace, 114 Massachusetts, 510 (1874), upon motion in the probate court to frame issues for trial by a jury, the question raised was referred to the full court. As to what proof of a lost will should be

given to show that it revokes an earlier existing will, Mr. Justice Gray, then Chief Justice of the Supreme Judicial Court of Massachusetts, says (p. 512):

> "But when a testamentary instrument is lost or destroyed, it cannot be admitted to probate without clear and satisfactory proof of its whole contents. Davis *vs.* Sigourney, 8 Met. 487. If it can be proved that a later will was duly executed, attested, and subscribed, and that it contained a clause expressly revoking all former wills, but evidence of the rest of its contents cannot be obtained, it is nevertheless a good revocation, and it can be made available only by allowing it to be set up in opposition to the probate of the earlier will, in accordance with the practice established in the English Ecclesiastical Courts before the Declaration of Independence, and adopted by the courts exercising similar jurisdiction in New York and New Jersey. Helyer *vs.* Helyer, 1 Lee, 472. Nelson *vs.* McGiffert, 3 Barb. Ch. 158–164. Day *vs.* Day, 2 Green Ch. 549."

In Cutto *vs.* Gilbert, 9 Moore, P. C. C. 131 (1854), the widow of Abram Cutto, the testator, propounded a will, executed in 1825, probate of which was resisted by testator's sister, on the ground that another will had been executed in 1852, revoking that of 1825, but that the latter will was lost. Testator died in 1853, possessed of considerable personalty, but no realty, and leaving his sister as only next of kin. Three witnesses testified they had witnessed a will for the testator in 1852, but were unacquainted with its contents. One of the witnesses, however, had seen the words: "This is the last will and testament of." The court below held that these words were sufficient to revoke the will of 1825. On appeal this ruling was reversed, Doctor Lushington for the court saying (p. 140):

> "We agree in the position laid down at the bar, that the *onus probandi* lies upon her (Mrs. Gilbert).
>
> . . . . . .

"The first fact to be proved, is the execution of some subsequent testamentary paper; and we here think it right to observe that we are of opinion, that where the revocation of an existing will is sought to be established by the proof of the execution of a subsequent will not appearing, and where there is no draft or instructions in writing, when such fact is to be proved by oral evidence only, such evidence ought to be most clear and satisfactory; for we concur in the opinion which has been expressed by very learned persons, that to revoke an existing will by parol evidence alone that another will has been executed, is, though the law may admit of it, a course of proceeding not unattended with danger, and, consequently, that such oral evidence ought to be stringent and conclusive.

"Mrs. Gilbert has pleaded, that in the month of August, 1852, the testator executed his last will and testament in writing; that he thereby revoked his will of the 11th of August, 1825, and that he intended to make a provision for her and her daughters; and she has further alleged, that after the execution of such will, the testator declared that he had executed his will. The evidence to establish these facts is to be found in the testimony of three witnesses, Watkins, Floyd, and White."

. . . . . .

(P. 142): "Now, what is the result of this evidence, taken in the most favorable light for the respondent? It is this, that the deceased executed a paper, the only contents of which proved, or what can be argued to be proved is, that it commenced with the words, 'This is the last will and testament.'

"It would be impossible to contend that the mere execution of a testamentary paper, subsequent to the will of 1825, would be a revocation, for it might be a codicil only, it might be confirmatory; and as the *onus probandi* is upon the respondent to show that it was revocatory, such revocation could never be established by proving the execution of a testamentary paper only; and in effect the question comes to this, whether the evidence of Floyd, stating that the paper

commenced with these words, 'This is the last will and testament,' and the remark to White that he had executed his will, works a revocation in law, such will being not forthcoming, and the other contents of the will being totally unknown."

. . . . . .

(P. 146): "Now, let us consider how these authorities bear upon the present case. There is not one authority which lays down the proposition that the execution of a subsequent will destroyed *animo revocandi* by the testator, the contents of which are not known, revokes a prior will. On the contrary, in all the cases where revocation has been held to be effected, there has been proof of a difference of disposition. These considerations alone would induce us to doubt the correctness of the judgment in the court below, in the case now under consideration; but the very foundation of that judgment appears to us to be unsound; that judgment is mainly based upon the evidence that the latter paper contained the words, 'This is my last will and testament.' We are of opinion, that these words do not import that the paper contained a different disposition of the property, nor that the mere fact of so calling it could possibly render it a revocatory instrument."

. . . . . .

(P. 147): "Considering, therefore, that the respondent, upon whom the *onus probandi* lies, has failed to prove what the law requires, the execution of a subsequent will expressly revoking the former, or of different contents, we must reverse the judgment of the court below, and pronounce for the will propounded by Mrs. Cutto."

This case is cited by Campbell, C. J., in Brown *vs.* Brown, 8 E. & B. 876–887, where, when speaking of the revocation of an existing will by a later lost will, he says:

"And the same doctrine is laid down in Cutto *vs.* Gilbert, 9 Moore, P. C. 131, by another great judge, Doctor Lushington, than whom no one has had more experience in such cases."

In Goods of Ripley, 1 Sw. and Tr. 68 (1858), the testator, Ripley, colonel of a native Bengal regiment in India, executed his will there and mailed to his solicitor in England a document which, he wrote, was a copy thereof. Sometime later he mailed another document which, he wrote, was a copy of a codicil to the aforementioned will, a copy of which he had previously forwarded. The codicil bore the testator's signature and the names of two witnesses, one of whom was proved to be dead, and the other, if alive, could not be found. Ripley was killed during the mutiny at Delhi, and the original will and codicil were not found among his effects.

On a motion to decree probate of the will and codicil, Sir C. Cresswell says (p. 69):

> "This was an application for probate of a supposed will and codicil (the alleged testator having been murdered at Delhi) as contained in what were said to be copies of the will and codicil sent over to this country. It seemed to me at the time when the application was made, that I could not grant it upon principle, there being no proof of the *factum* of the original will and codicil *except the declarations of the supposed testator, made after their execution, that he had made such a will and codicil.* But as the circumstances of the case caused me to feel rather disposed to grant probate of the instruments, if I could do so with propriety, I was anxious to have an opportunity of seeing whether any instance could be found in which the Prerogative Court had granted probate under similar circumstances. No instance could be found; but in the case of Doe d. Shallcross *vs.* Palmer, 16 Q. B. 747, a Common Law Court refused to receive in evidence the declaration of a testator, made after the execution of his will, that an interlineation in it was made before execution. If a declaration made after execution as to an interlineation could not be received, *a fortiori* a declaration as to the actual making of a will could not be received. There being no other evidence as to the

factum of the will, I am bound to refuse probate of the copy. I must reject the motion."

Clark *vs.* Morton, 5 Rawle (Pa.), 235 (1835), was a contest over the will of Judge Morton. A witness testified that testator had told him he had written his will himself; the court, over objection, then permitted him to narrate the contents of the will as stated to him by the testator. The court instructed the jury that if they believed from the testimony of two witnesses proving repeated declarations of the testator that he had executed a will, that it existed at the time of his death, and had since been spoliated, and that the contents of the will were as proved by witnesses, then they must find for the plaintiffs.

This the jury did and defendants excepted.

Kennedy, J., in reversing the judgment, says (p. 240):

"The main question to be resolved in this case is, whether the making of a will in writing and its contents can be established by parol evidence of the verbal declarations of the deceased going to show that he had made a will in writing and how he had disposed of his estate by it.

"By our Act of Assembly of 1705, a will made in order to convey lands must be in writing and proved by two or more credible witnesses. Now it is perfectly obvious that the proof required to be made of a will for such purposes, necessarily involves the proof of its actual existence. But can this, according to the true meaning of the act of assembly, be done by giving parol evidence of the verbal declarations of the party alleged to be the testator, without producing the will itself; *or proof being made that it had been seen, or that the party claiming in opposition to it, had admitted its existence?*"

. . . . . .

(P. 241): "If, however, the verbal declarations made by a person before his death, stating that he had made his will in writing, and that he had thereby disposed of his estate in the manner then men-

tioned by him, are, after his death, upon proof being made by two credible witnesses of their having been uttered by him, to be taken for his will, *without any proof of such writing having ever been seen*, the great objects of the act of assembly will be defeated, and the actual writing of wills for the purpose of passing lands as required by it, dispensed with. Because it is easy to perceive that a will disposing of the land of the deceased may be established by this means without a word, or even a syllable having been written for the purpose. It would be sufficient after his death to prove by two witnesses that they had heard him say before his death that he had made his will in writing and disposed of all his estate in a particular way, then mentioning how it was. In such case, if no written will in fact was ever made, it would of course be impossible to produce it; and then, according to the doctrine contended for by the counsel for the defendants in error, the declarations of the deceased ought to be received, as the best evidence that could be had of the making of it, seeing none could be found. Now, although we might, without knowing that the person making such declarations had, as many often have had, certain reasons for concealing or perhaps for misleading those around them, in regard to the disposition that he wished to have made of his estate after his death, be inclined to think that his declarations in this behalf afforded some presumption of his having made a will in writing; yet, as soon as it is ascertained that no such will can be found, this presumption I think entirely vanishes; hence it appears to me that in the absence of the *corpus* of such will *and of all evidence that it had ever been seen by a witness, the declarations of the deceased ought not to be admitted in evidence for the purpose of establishing it.*"

He then disposes of the contention that these are declarations against interest, and as such admissible, and says (p. 243):

"If the declarations of the deceased were to be received as evidence for such purpose [*i. e.*, to establish the will as above stated], it would necessarily follow

for the same reason, that a written will, produced after the death of one who had made it, and proved in due form might be revoked and set aside by proving that the testator had declared that he had revoked it in due form by a writing signed by him for that purpose, *although no such writing could be produced, or evidence given showing that it had ever been seen by any witness*, which would, as it appears to me, be directly repugnant to the whole meaning, letter and spirit of the act of assembly, and would, in short, be making the mere verbal declarations of the deceased supply what the act has expressly declared must not only be in writing, but that the writing itself must be proved at least by two witnesses."

In Caeman *vs.* Van Hark, 33 Kans. 333 (1885), the testator died in 1883, leaving a validly executed will, dated in 1874. This will was "attacked upon the ground of revocation only" (p. 336), in that it had been revoked by a will made in 1877, which it was alleged had been destroyed by testator's widow.

Johnston, J., for the court, after quoting the statute regulating the revocation of wills, says (p. 336):

"The plaintiffs claiming that the will in contest has been revoked and superseded by a later one, it is incumbent upon them under the provisions of the statute last quoted, to prove by competent testimony that the instrument of a later date purporting to be a will and to have the effect of revoking an earlier one admitted to be valid, was executed with all the formality and solemnity prescribed by the statute in the making of a will. They must first show the existence of such an instrument; that it was made in writing by the testator when he was of sound mind and memory; that it was signed by him at the end thereof, or by some person in his presence and by his express direction and attested and subscribed in his presence by at least two competent witnesses who saw the testator subscribe or heard him acknowledge the same; and it must also appear that such instrument either in express terms re-

voked the former will or that its provisions, in devising the property, were so far inconsistent with the earlier will that it would operate as a revocation."

. . . . . .

(P. 337): "There is no testimony offered showing when the alleged later will was made, by whom it was drawn, whether it was regularly signed by the testator, nor that it was subscribed in the presence of attesting witnesses. *No witness is offered who claims to have seen such a will, nor does anyone assume to have personal knowledge of what its provisions were.* The testimony that was offered was very vague and unsatisfactory."

He then reviews the testimony and continues (p. 338):

"Plaintiffs undertook to supplement this testimony with statements made by the testator during his lifetime, and after the date when the subsequent will is alleged to have been made. This testimony with some we have already adverted to was clearly incompetent and is not entitled to any weight in the determination of the issue in this case.

"A wide range of inquiry is given in a case where the validity of the will is challenged on the ground that the testator is not of sound mind and also where it is claimed that the will was procured by any undue influence involving the mental condition of the testator at the time the will was executed. In such cases, the declarations of the testator, made at or before the execution of the will, are competent evidence; but upon the question of the revocation of a will once properly executed and admitted to have been valid a different rule obtains. The declarations of the testator in such a case are not competent testimony, unless they accompany the act by which the will is revoked and they must be at or so near the time as to become a part of the *res gestæ*. All other declarations are mere hearsay and are not admissible to impeach the will."

Alleged declarations of Judge Holt that he had made a

will giving pictures to Mr. Barclay's mother (Rec., p. 29); that Washington Holt would attend to his affairs (Rec., p. 37) and get everything that he had (Rec., p. 79) and the like, not only fall far short of establishing the actual execution of a later will and proving its contents, but were not even admissible in evidence.

The claim, therefore, that the will in controversy was revoked by a subsequent will is absolutely unsupported.

No Evidence of an Express Revocation in Writing.

This form of revocation could only exist in a later will containing a revocatory clause or in a later writing expressly revoking this will in terms or all wills of antecedent date.

That no revocation by later will was accomplished has already been demonstrated.

No writing of a revocatory nature was produced nor was any evidence offered tending to show that any such paper ever existed. This form of revocation like that by word of mouth is without even the pretense of support by anything in this Record.

No Evidence of Revocation by Burning, Canceling, Tearing, Obliterating or other Form of Destruction or Defacement.

The will in controversy, when offered for probate, as already stated, was both torn and burned and it is freely admitted that its condition is sufficient for its effectual revocation so far as mere physical defacement is concerned. If done by Judge Holt or anyone else by him authorized, the presumption of law that it was done with the intent to revoke would at once arise. This presumed intent may be supported or rebutted by extraneous facts and circumstances tending to show the state of mind and intentions of the testator at the time the act was done.

All these propositions were admitted by the caveatees at

the trial and in the Court of Appeals and have never been disputed in this case.

As, however, no one but the testator or some one by him expressly authorized can revoke a will by burning or the like, the first inquiry is—

Who did the act by which this paper was put in its present condition?

Important as an answer to this question is, especially to those setting up the revocation, the fact remains that every witness examined in the case absolutely denied any knowledge whatever of the paper or its condition until its receipt by the Register of Wills.

To establish revocation by burning, tearing, canceling or obliterating the will, it is well settled that some evidence affirmative or presumptive must be given that such act of burning, tearing, etc., was done by the testator or by some other person by his direction. Until this is done, it is not material to inquire as to the intent of the testator. Intention is a mere quality or attribute, while the act is the substance. The establishment of the substance is essential before an attribute to it can be ascribed.

Evidence, therefore, or even absolute and undisputed proof that, after the date of the paper in controversy, Judge Holt's affection for his relatives increased, that their relations became close and intimate, and that his fondness for the persons named in his will had given place in later life to dislike and even hatred, in an inquiry as to whether or no he did the act of burning, tearing, etc., could not aid the court in the slightest degree in determining that substantive fact. And the authorities conclusively establish that, however strong the proof of the intent to revoke may be, such proof cannot establish revocation, until the doing of a revocatory act by the testator or by some other person, by his express direction, be proved.

In Cheese *vs.* Lovejoy, 2 L. R. Prob. Div. 251 (1876,) the testator threw his duly executed will in a waste basket,

having first written on the back: "All these are revoked." A servant picked up the will and left it lying about the kitchen, where it still was when the testator died. It was held there was no evidence of revocation. On application for the allowance of an appeal from this ruling, James, L. J., says (p. 253):

> "We cannot allow the appeal in this case. It is quite clear that a symbolical burning will not do, a symbolical tearing will not do, nor will a symbolical destruction. There must be the act as well as the intention. As it was put by Dr. Deane in the court below: 'All the destroying in the world without intention will not revoke a will, nor all the intention in the world without destroying; there must be the two.'"

Andrew *vs.* Motley, 12 C. B. N. S. 514 (1862), was an action of ejectment. J. Andrew died leaving a will dated in 1786. One of the devisees who took an estate for life under this will in some of the property entered and resided there till his death in 1857. On his death a paper purporting to be a will of Andrew, dated in 1788, was found in a box among the effects of this devisee with the probate of the first will, the later will having its seal torn off.

The plaintiff claimed under the first will and the defendant under the second. The court instructed the jury that they might infer that the testator had intended to recall the second will from which the seal was torn and treated it as nullity, or that he had given it to the person in whose custody it was found to have it destroyed. The jury found for the plaintiff. Williams, J., held this to be error, saying (p. 523):

> "It is clear that a man cannot simply abandon a will without more. Even before the Statute of Frauds a will could not be canceled without the testator's demonstrating in some way that he intended to revoke it. Swinburne on Wills, 990. But with regard to wills made after the Statute of Frauds, it is clear that

> a man cannot revoke his will even by manifesting in the strongest way his intention that it shall no longer operate unless he pursues one of the modes pointed out by the sixth section. There is no pretense for saying that anything of that sort was proved or found here."

In Hise *vs.* Fincher, 10 Iredell Law, 139 (1849), the testator gave his will to his son with instructions to burn it. The son deceived his father by throwing another paper on the fire preserving the will intact, and after the testator's death the will thus preserved was propounded for probate. The only issue was revocation.

Ruffin, C. J., held that on these facts no revocation could have taken place. After stating that the North Carolina statute regulating the revocation of wills was substantially the same as the Statute of Frauds, and quoting it in part, he says (p. 141):

> "It is obvious that the main purpose of the act is to alter the rule of law by which the revocation of a written will duly attested could formerly be established by parol proof merely; and that is done, by requiring the intention to revoke to appear, not merely from the mouths of witnesses, but also by some overt act, apparent in another writing or on the paper itself alleged to have been revoked.
>
> . . . . . .
>
> "But the very question is, whether upon this parol evidence, by itself, an intention to revoke can be found, or, if the intention be granted whether the law will allow such intention to burn and revoke to be, in fact and law a burning and revocation. The statement of the question seems to furnish an answer to it in the negative. The statute positively requires things to be done and not merely said or intended to be done. The court cannot dispense with those acts, upon the ground that in requiring them the statute put it in the power of a bad man to deceive and defraud a testator. That was for the consideration of the legislature; which body has, nevertheless, used

language on the subject, which is clear and explicit, and which, therefore, the judiciary must observe, though, in a few very extraordinary cases it admits the possibility of fraud and imposition. For it is clear the legislature deemed it the better policy to submit to that inconvenience in a solitary instance, now and then—since human sagacity is not competent to guard perfectly against fraud of every kind—than to let in the more extensive and frequent mischief, arising from perjuries committed in proving verbal declarations to burn or cancel a will, and a supposed belief of the testator that it had been done. We conceive the words of the act are diametrically opposed to the hearing of any evidence of the kind, and that to effect a revocation of a will there must be deeds within some one of the definite words used.'

In Gains *vs.* Gains, 2 A. K. Marsh. 190 (1820), the claim was set up that the testator wished to destroy his will but had been forcibly prevented from doing so. In disposing of this contention, Boyle, Ch. J. says (p. 191):

"The act concerning wills, after having prescribed the manner in which a will shall be made, provides, 'that no devise so made, or any clause thereof, shall be revokable but by the testator's or testatrix's destroying, canceling, or obliterating the same, or causing it to be done in his or her presence, or by a subsequent will, codicil, or declaration in writing, made as aforesaid.'

"None of these acts were done, and *we can not, under any circumstances, substitute the intention to do the act for the act itself.* Construction is admissible only where there is ambiguity; and there is no ambiguity in the provision referred to. *To substitute the intention to do the act, instead of the act itself*, without which the statute expressly declares the will shall not be revocable, *would be changing the law, not expounding it.*"

In Sewell *vs.* Slingluff, 57 Md. 537 (1881), Ella Slingluff, a married woman having no children, executed a will leav-

ing all her estate to her mother. Subsequently she bore two children, one of whom survived her, as did also her husband and mother.

Proof of alleged declarations of the testatrix that she did not wish her will to operate in the event of her leaving issue surviving, was offered. The Court of Appeals ruled this inadmissible, saying (pp. 548–9):

> "Wills are more especially guarded and protected by the law than any other instruments. They are guarded in their inception by the formalities required by our statute, and after they are made they are equally guarded by our statute, which points out the only mode by which they can be revoked or annulled.
>
> "This will may be treated as intending to pass real estate, and the mode of its revocation is pointed out in Sec. 302 of Art. 93 of the Code, which provides that no such will shall be revoked except by some other will, or by burning, canceling, tearing, or obliterating the same by the testator himself, or by some other person in his presence, and by his direction and consent. This statute is imperative in its terms, and no mere verbal declarations of a testator, however strongly expressed, and however earnestly he may wish or intend so to do, can have any effect upon a will after its execution. It can only be revoked in the manner prescribed by the statute. Wittman and Wife et al. *vs.* Goodhand, Admx., 26 Md. 95.
>
> "To allow the parol declarations of the testatrix, whether made before, after, or at the time of the execution of the will, to render that will inoperative at some future time, and in the event of some future contingency, would be nothing more or less than to allow a parol revocation of it. It makes no difference, that we can see, whether such revocation is called a revocation or by some other name. To revoke or to render inoperative are synonymous terms, and to allow the evidence for the latter purpose is to allow it for the former. The practical effect is precisely the same."

After discussing certain authorities, the court adds (p. 554):

> "These cases go, perhaps, as far as any cited in allowing parol evidence. But in these and in all the other cases referred to the courts have restricted the evidence to the ascertainment of the *animus-testandi*, and have never gone beyond that. Even if we were to admit that these cases were well decided (which we do not determine), we consider the parol evidence offered in this case inadmissible. If it were in any such case admissible, we would be unwilling to reject it in this, as the straightforward testimony and disinterested conduct of the husband of the testatrix presents a strong case, and one with many equitable features strongly appealing to our sense of justice. But we must take the law as we find it; and as in all the long period that has elapsed since the passage of the Act of 29th Charles II, no court has permitted such testimony to be received, we cannot do so now."

In Wittman *vs.* Goodhand, 26 Md. 95 (1866), it was contended that the—

> "will was fraudulently kept concealed by the appellee, after the testator had directed her to destroy it, and that he died in the belief that it had been destroyed" (pp, 105–6).

It was attempted to support this by testimony to the effect that the testator had said, in 1886, four years after the date of the will "he had concluded to die without a will." "That the State of Maryland would make a good enough will for him;" and that "he wanted to make no difference between his children." In 1864 or 1865, two or three years after the date of the will he had "expressed his determination to die without a will, and that he wished to make no distinction in the distribution of his estate between his children" (pp. 98, 99).

Bartol, J., in delivering the opinion of the court, says (p. 106):

> "As to the declarations of the testator, it is clear

> that they could not amount to a revocation of the will, which, under the Code, Art. 93, Sec. 303, could not be effected except by writing."

In Allen *vs.* Huff, 1 Yerger, 404 (1830), "the heirs relied upon a parol revocation" of the will propounded. The will was proved by subscribing witnesses in due form, and contestants then gave in evidence declarations of the testator made subsequent to the date of the will, to the effect that his will "should not stand;" that the law made as good a will as any; that he once made a will but had broken it; that he wished to make another will, and the like. The will disposed of both real and personal property.

The court below charged the jury that such a will could not be revoked by parol either as to realty or personalty.

Mr. Justice Catron, then a member of the Supreme Court of Tennessee, in affirming the judgment of the court below, says, (p. 406):

> "Could this will be revoked by parol? If so, the circuit court erred in rejecting the evidence from the jury. To decide this question the court is called upon, perhaps for the first time since its existence, to give a construction of the Statute of Descents of 1784, Ch. 22. The 14th sec. declares, 'that no written will shall be revoked or altered by a subsequent nuncupative will except the same be, in the lifetime of the testator, reduced to writing and read over to him and approved, and unless the same be proved to have been so done by the oaths of two witnesses at least, who shall be such as are admissible upon trial at common law.'
>
> "Former adjudications of North Carolina and Tennessee have declared this section as applicable alone to a bequest of goods and chattels by a former will. No. C. L. R. 91. Peck's R. 306. So we will take it. This will could have been revoked in part directly or by implication. Greer *vs.* M'Cracken, Peck's R. 301. First, then, as to the personalty; was parol proof admissible to prove it revoked? The statute says not. To make the nuncupative revoca-

> tion effectual it must have been reduced to writing in the testator's lifetime and read over to him and approved by him. The facts that the paper was read to the testator and approved by him must be proven by two competent witnesses. It need not be subscribed by the testator or the witnesses, yet the writing alone can be received to contradict the written will. In a case so delicate as memory of what a testator casually said, where perversion and perjury are so much to be dreaded the legislature wisely guarded against such mistakes by requiring a writing and rejecting all inferior proof of revocation. So far then as personal property was devised by the testator the charge of the circuit court was correct."

The court then discusses the revocation of wills of real estate and reaches the conclusion (p. 409) that "The evidence of revocation must be of dignity equal to the instrument revoked."

Speaking of the evils which would result if parol revocations were permitted, the court says (p. 408):

> "The testator, aged and garrulous, the sick and fretful, the literally dying from ill temper, or imposition by the interested, makes a hasty expression; by an intemperate word, revokes his will, cuts off his wife, and sets up collaterals; a momentary flush of feeling not thought of the next hour, sets at naught the testator's most solemn act. If revocations can be thus made and thus proven, the aged, the sick and peevish had better not make wills more likely to destroy their estates by litigation than preserve them to their devisees."

In Ladd's Will, 60 Wis. 187 (1884), a will valid in every respect was found after the testatrix's death in 1882. It was written on one side of a double sheet of paper and dated in 1870. On the back of the blank sheet was written, in testatrix's handwriting, in pencil: "I revoke this will," with date in 1879 and signature. It was proved by witnesses

that testatrix had often declared her intention of revoking her will.

Cassoday, J. (author of the work on Wills), in an exhaustive opinion, held the written words did not constitute a revocation. Speaking of the declarations he says (p. 199):

> "It is not claimed, and there is no evidence tending to show, that any of such declarations were made at the time the words in pencil were written, but on other and different occasions. Such declarations are clearly inadmissible, because they do not constitute a part of the *res gestæ*; besides, to allow them to have the force of evidence would be admitting testimony of one unsworn and without the privilege of cross-examination. Jackson *vs.* Kniffen, 2 Johns. 31; Waterman *vs.* Whitney, 11 N. Y. 157; Staines *vs.* Stewart, 8 Jur. (N. S.) 440; Boylan *vs.* Meeker, 28 N. J. L. 274; Hargroves *vs.* Redd, 43 Ga. 142; Runkle *vs.* Gates, 11 Ind. 95. The admission of such declarations to rebut the inference of fact arising from the absence or loss of a will is upon a different theory, as will appear from the well written and able opinion of Judge Dyer in Southworth *vs.* Adams, 11 Biss. 256."

In Perjue *vs.* Perjue, 4 Iowa, 520 (1857), R. Perjue, who died in August, 1855, left a will dated February, 1851, giving his entire estate to his wife, with certain limitations over. The execution of the will was proved as well as the competency of the testator, etc. It was also proved that a few days prior to his death testator, in the presence of several people, declared that he "wanted his affairs arranged as follows" (naming certain dispositions of various pieces of property), and at the same time he referred to his written will, said it was "of no force" and "not to his notion."

On this state of facts Wright, C. J., held no revocation had taken place, saying (p. 522), that these circumstances "can in no way or manner affect the validity of this will."

In Crocker *vs.* Chase, 57 Vt. 413 (1885), Powers, J., says (p. 419):

> "It is settled on authority that such subsequent declarations cannot be received to establish any fact embodied in the declarations. Wills in writing cannot be impeached by parol statement any more than other written instruments. They cannot be revoked except in the manner pointed out in the statute."

At the trial of this issue the caveators made no attempt to show by any affirmative evidence that Judge Holt himself or any one by his authority did any of the acts of mutilation appearing on this will. Indeed any such evidence would have been fatal to their contention that it was a forgery. Unless therefore by some competent evidence in this Record Judge Holt can be connected with the acts of burning, tearing and the like which were done to this will, it must be treated as though such acts had never been done. In the absence of any affirmative evidence tending to connect him with the acts of mutilation, we are brought to the inquiry whether the evidence raises any presumption that Judge Holt either tore or burned, or authorized another to tear or burn this will. It is submitted that it does not.

The Presumption is that the Mutilation was Neither Done nor Authorized by Judge Holt.

Both the courts below, as heretofore shown, were greatly embarrassed in the consideration of every branch of this case by the peculiar and, as they were then regarded, unprecedented circumstances of the anonymous appearance of this mutilated paper, and avoided a definite decision as to the presumptions arising therefrom.

The trial justice, in ruling upon one of the objections in the course of the trial, at the beginning of the caveators' testimony had occasion to consider this subject and arrived at the conclusion that there was no presumption either that

Judge Holt did or did not mutilate the instrument, saying (Rec., p. 33):

> "There can be no presumption that some third person mutilated it, and I think there can be no presumption that it was mutilated by the testator.
>
> "Certainly, unless it appears that this will came from some other source than from someone who had picked up the testator's papers, if it does not appear that it came from the custody of someone who would have some interest in mutilating it, it does not appear to me that there can be any possible presumption that it was mutilated by some third party.
>
> "In the absence of presumption either way, where are we left?"

And again in his charge to the jury, he says (Rec., p. 133):

> "There is, therefore, no presumption arising out of the fact itself that the paper has been mutilated, burned, or torn that it was the act of Joseph Holt; but you are to take these circumstances in connection with all the evidence and strive to reach a conclusion."

The Court of Appeals, however, in determining this branch of the case went further, saying that if the paper had been found in its present condition in the repositories of the testator a presumption of revocation would at once attach, adding (Rec., p. 154):

> "Coming to light at the time and in the manner in which this paper did, *we are not sure* but that the same presumption of revocation ought to be indulged.
>
> "Certainly, it would be more just and more consistent with the reasons for the ordinary presumptions of law, to presume that the paper had remained under the control of the testator and had been spoliated by him, as he had the lawful right to do, rather than by a stranger, who, in suppressing or defacing the will of another, commits a heinous offense."

It is freely admitted that, had the paper in the condition

in which it was produced at the trial been found in the repositories of the deceased, a presumption would have arisen in favor of its revocation. It may also be conceded, for the purposes of argument that, had the paper in this condition come to light in the hands of some disinterested third party, the question might have been open and no presumption either way would have attached. The absence of any presumption can not, however, aid the caveators, who have the burden of showing that the condition of the paper is the result of an act by Judge Holt.

But it is submitted that the court in determining what presumption attaches to this paper can not stop with the consideration of its condition and manner of appearance, but must go further and consider all the circumstances in evidence which tend to throw any light upon its present condition. This both the courts below failed to do, and hence proceeded their error.

The only evidence in this Record bearing directly upon the history of the paper propounded, in addition to the evidence as to handwriting of the testator and of the subscribing witnesses, tending to show it to have been at some time a valid, subsisting will, and that tending to show that Judge Holt and the three witnesses were together at the time it purports to have been executed, is, that during the evening of August 24th, 1894, an official of the United States Post Office at the main Post Office in this city, marked the envelope containing it with a stamp indicating that it had been collected by a carrier from a public mailing box in the most populous part of this city—the northwest section; that it lay over Sunday in the Post Office and was delivered by the carrier when making the first mail delivery the following Monday morning to its addressee, the Register of Wills of the District of Columbia, that official being then the only lawful custodian of the document (so constituted by Maryland act of 1798, Ch. 101, Subch. 2, Secs. 2 and 3), in

whose possession it has ever since remained (Rec., pp. 21, 48, 119).

While the above is all the evidence bearing directly upon the history of this paper, one other fact—a most important, extraordinary, and, it is submitted in this connection, all-controlling fact—which was wholly ignored by both the courts below, was brought out after the caveatees had closed their case, upon the examination of the assistant of the Register of Wills (Rec., p. 48), viz., the fact that two of the caveators, Washington Holt and Sterett, who, in the event of Judge Holt's death intestate, would together, with Sterett's sister, Mrs. Bowmer, have succeeded to two-thirds of the estate, and would, to that extent, have benefitted by the suppression or destruction of the paper in controversy, took possession of all Judge Holt's effects, ransacked his papers in secret, selected therefrom such as for any reason they did not wish should be preserved to be seen by other eyes than theirs, and burned them.

While conceding all the force that can possibly be claimed for the presumption of innocence, that presumption can not be applied to an act in itself unlawful, as this was, and counsel are yet mindful, and in this connection most earnestly urge upon the court the application of a maxim of law as old as that presumption, "*In odium spoliatoris, omnia praesumuntur.*"

No person other than these two caveators, and the servant Strothers who assisted them in the unlawful destruction of some of the deceased's effects, and who, from that time to the time of the trial was supported and housed by them, could possibly have any knowledge of what papers were burned and suppressed. They give an account of what these papers were (Rec., p. 80) and claim that nothing of a testamentary nature was among them.

But these parties, before administration granted and without color of right destroyed some of Judge Holt's papers. In doing this they were guilty of an unlawful act and must

be held responsible for the consequences of such unlawful act, and one of the consequences of this act is that the presumption arises that they destroyed and intended to destroy something they had some motive in suppressing. In considering the question of what presumption arises upon all the circumstances of this case, as to who burned and mutilated this paper, is the court bound to accept as final or even sufficient the unsupported account given by the wrongdoers of such improper and unjustifiable conduct?

When the master of a merchant vessel in time of war is shown to have spoliated his ships-papers before the boarding of his vessel by naval officers of one of the belligerent powers, no inquiry is made as to what papers he destroyed, but the presumption immediately attaches that the papers destroyed were of a damaging character, and the vessel is seized and carried into port to be adjudicated as prize. Unless the explanation be prompt, frank and satisfactory, condemnation will follow and in the words of Chancellor Kent (1 Comm. *158) when spoliation is shown "a case that escapes with such a brand upon it is saved so as by fire."

The Pizarro, 2 Wheat., 227.

This principle was applied in the leading case of Armory *vs.* Delamirie, 1 Strange, 504 (1722), where, in an action to recover the value of a jewel unlawfully removed from its setting, it was held that the law "should presume the strongest against" the wrongdoer, and that he was consequently liable for the value of the finest stone that could be fitted into the setting. In Hare & Wallace's notes to this case (1 Smith's L. C., 8th Am. Ed., pp. 688–690) are collected the authorities on this subject, which may be summed up in the lines from Leading Cases Done Into English (Lond., 1876):

> "For what man hideth truth in wrong doing,
> "Against him the law deemeth everything."

Quoted, Lawson on Presumptive Evid. 184, note.

This principle has also been applied to cases like the one

at bar, where parties to whose interest it was to suppress testamentary papers of a deceased, first took possession of a testator's effects and were guilty of improper and suspicious conduct.

Such a case was Podmore *vs.* Whatton, 3 Swabey & Tristram, 449 (1864). The testatrix, Miss Whatton, died, leaving her brother as only next of kin, who, immediately upon her death, took out letters of administration upon her estate. Podmore, the plaintiff, sought to probate the draft of a will executed by the deceased some six years prior to her death, the original not being forthcoming. The execution of this will was proved and its identity with the draft established. It was shown that the deceased, after executing the will, took it with her and placed it with other valuable papers in a certain black box in her room, and it was in evidence that on a subsequent occasion the deceased had stated that her will was in that box.

The defendant, the brother of the deceased, came to the house a few days prior to her death, obtained possession of the key to this box and searched for a will. He was seen with a paper in his hands which he declared was a will, and he said that as he was the nearest relative of the deceased everything ought to go to him.

Sir J. P. Wilde, in the course of his opinion says (451):

> "The will having been thus made, the next and most important question is, what became of it? On the part of the plaintiff it was urged that this was an inquiry upon which the court was not bound to enter; that the will once made, could only be revoked by the specific methods indicated in the Wills Act, and that, unless the defendant established its revocation, the court was bound to pronounce it unrevoked and admit it to probate. On the part of the defendant it was argued that as the will itself was not forthcoming, and had been last seen in the custody of the testatrix, the law must presume that she herself revoked it.
>
> "The court cannot accede to either of these views.

A material question of fact has to be decided in this case before any presumption arises on either side; and it is this—was the will found at the decease of the testatrix or not? If it was found at her death and in an unmutilated state then she did not revoke it. If it was not so found, then there is room and foundation for the revocation which the law will presume in the absence of testimony to rebut it. In most cases the solution of this question presents no difficulty. For the depositories of the deceased are duly searched *by those whose good faith is not impugned*, and who vouch for the fact one way or another. But in the present case it is far otherwise. A large body of evidence has been produced tending directly to question the fair dealing of the defendant, who had sole access to his sister's papers, and the charge of suppressing this will was but thinly veiled, though faintly pressed against him."

After reviewing the evidence substantially as above, he continues (p. 455):

"All this evidence leaves a clear result on my mind. I am satisfied this will was in the box of the deceased when she died, and, as the keys of that box were at once handed to the defendant, I am also clear that the will passed to his hands. Whether he destroyed it or whether he has it now, or where it is or what has become of it—these are needless questions; for, if he as spoliator has suppressed it, I cannot doubt that the plaintiff is entitled to probate of the draft until the original will appears. It was strongly pressed at the trial that the court should be cautious almost to timidity in basing its decision upon the ground of the defendant's guilt and the door was held open to the safe refuge of 'not proven.' But *it is well to bear in mind that there are two parties to the suit, and that undue tenderness to one is denial of justice to the other.*"

In Finch *vs.* Finch, L. R. 1 P. D. 371 (1867), a lost will was propounded for probate. It was proved that the testa-

tor executed a will, and that it was last known to have been in his possession, but after his death was not forthcoming. Declarations of the testator were admitted to the effect that he had made a will leaving all his estate to his daughter, the plaintiff, and that he was displeased with his son, the defendant. There was also evidence tending to show that the deceased had stated his will was in a certain drawer.

On the day the testator died his son went alone into the room where the will was supposed to be, and was seen coming out acting as if concealing something. Later he informed his sister that he must administer on the estate, and on being advised by her that there was a will, he told her to hunt for it. They went together to the place where the will was supposed to be, and he produced the key to the drawer from a place other than that in which it had usually been kept.

Sir J. P. Wilde, in delivering judgment, says (p. 372):

> "This case must be decided upon the same principle as that upon which the court proceeded in Podmore *vs.* Whatton, 3 Sw. & Tr. 449. There is no doubt that if a man dies, after duly executing a will and at the time of his death his will having remained in his custody is not in existence, the law presumes that it was revoked. But, in all such cases, the question to be determined is whether the will was or was not in existence at the time of the death."

He then quotes from Podmore *vs.* Whatton (*supra*) to the effect that this question is generally of ready solution by reason of the repositories of the deceased being usually searched by persons whose good faith is not impugned, and continues (p. 373):

> "But that difficulty does present itself in the present case, for the depositories of the deceased *before they could be reached by any independent person*, were clearly accessible to and are proved in evidence to have been investigated by the only person who was inter-

> ested in destroying the will, if it existed—namely the defendant. The question is whether the circumstance that the will could not be found after the defendant had access to and had searched the depositories ought to satisfy the court that it was not in existence when the testator died."

He holds this circumstance not to be satisfactory and pronounces for the will.

In Haleyburton *vs.* Kershaw, 3 Desau. (S. C.), 105 (1810), the complainant, the heir at law of one White, filed a bill against White's administrators to get the benefit of a contract made by White with a builder to construct a house, which contract they had canceled and destroyed. Desaussure, Chancellor, after stating the contract had been proved and admitted by the administrators, says (p. 112):

> "No presumption seems wanting. If it had, the court would have been inclined to have made them in favor of a complainant who has been deprived of the benefit of the written contract by the act of the defendants. The court will go very far in presuming against those who destroy papers and instruments necessary to the security or elucidation of the rights of others, *in odium spoliatoris*, as it is expressed. I do not apply that phrase to these defendants; they are good men who acted unadvisedly, and not wilfully wrong; but the effects of that error are the same to the complainant. And he would be entitled to the benefit of all the presumptions which could reasonably be raised out of the circumstances for his benefit."

Directly in point, not only by reason of the decision of this precise question, but also by reason of the similarity, it may almost be said, identity of its facts, is the case of Hitchings *vs.* Wood, 2 Moore P. C. 353, 2 Curt. 82, cited and fully discussed (*supra*, pp. 34–49). In that case it will be remembered a burned and mutilated testamentary paper came anonymously through the mails. In the course of the

trial, as in the trial of the case at bar, it unexpectedly developed that the persons most interested in the supression of the document, who had been in possession of the testator's effects from the moment of his death, had unlawfully burned some of his papers.

It was objected that this paper could not be propounded for the reason that it was a cancelled document. But in disposing of this contention Sir Herbert Jenner says (2 Curt., 114):

> "The court was of opinion that the cancelation was not so clear as to prevent the parties from being permitted to propound the paper, more particularly as it is represented in the anonymous letter to have been saved out of many burnt by parties the writer could hang; and therefore, if such were the case, it is evident that they could not have been destroyed by the deceased, but by some other persons who had an interest in destroying this paper."

And the Privy Council when asked to hold that this paper had been revoked, said (2 Moore P. C. C. 447–448):

> "We, think, if this be a genuine instrument, that the onus to make out the fact of the cancelation is on those who oppose the codicil. It seems that a corner had been burnt, the paper torn through, and in one place across the signature; but by whom and under what circumstances does not appear. There is nothing whatever to show that it was done by the testator, or if so, with what intention it was done. . . . It is obvious, we think, that it must have been improperly dealt with, for if it was defaced by the testator he would either have entirely destroyed it or it would have been found in this state among his papers. The circumstance of its being in other hands shows that a fraud had been practiced, and that no safe conclusion can be drawn from its appearance that it was burnt or torn by the testator."

In the decision of all these cases the courts invoked no new and untried rules of law because of their novel circum-

stances, but applied the principles laid down by our oldest text writer on the law of wills,

Swinburne on Testaments and Last Wills (6th Ed. p. 538):

"What if the testament be found cancelled and defaced, but it is not known who did it? To whom is this act of cancelling or defacing the testament to be attributed? To the testator which made it, or to some other, which otherwise peradventure might be hindered by it?

"It seemeth not to be reputed the act of the testator; for mutation or change of the mind is not to be presumed; especially after a man hath done a thing with such deliberation and resolution wherewith testaments commonly are made and finished.

"On the contrary, it seemeth that it ought not to be accounted the act of any other; for that were to presume fraud and deceit in men; which ought not to presumed, unless it be proved.

"In this controversy, therefore, I suppose that the person in whose custody the testament is found so cancelled or defaced is to be adjudged to have done the act, whether it be the testator or another.

"And if it be so that the testament were kept in such a place, as not only the testator, but others might have access unto it; in this case the arguments and circumstances of the fact being equal and indifferent, the cancelling or defacing of the testament is rather to be ascribed to the testator than to others; who is also presumed to have done the same wittingly and willingly; saving in Legacies of Freedom, or *ad pias causas;* which being blotted or put forth by the testator, it is not presumed to have been done willingly. *But when the argument and circumstances be unequal, and the greater presumptions that it should be the act of another rather than of the testator, it is to be adjudged accordingly; for the fewer and weaker presumptions give place to the more and stronger.*"

The trial justice when he first expressed himself upon the

subject of the presumption, if any, to be attached to this paper (Rec., p. 33), had before him only the evidence of the manner of its appearance and the marks of mutilation borne upon its face. He seems to have been unduly influenced by the erroneous belief that this was an entirely novel and unprecedented case. When later in the trial it was shown that Washington Holt and Sterett had been guilty of unlawfully destroying some of the testator's papers, (Rec., pp. 48, 80, 81, 87,) the court failed entirely to connect this highly important circumstance with the facts which it had before it when the original ruling was made, and in charging the jury adhered to its first position.

It is not, however, necessary to indulge in the presumption that the caveators either wittingly or unwittingly mutilated this paper. The caveatees are not driven to the necessity of choosing between them and Judge Holt. It is a matter of no possible consequence who tore and burned this paper if it was not done by Judge Holt or some one acting under his orders.

The only persons in the world who knew what papers were in possession of Judge Holt at the time of his death are Sterett and Washington Holt. They testify as witnesses for themselves and the other caveators and swear positively that this paper was not in any of Judge Holt's repositories at that time.

By this testimony, whether true or false, the caveators are bound, and they can not therefore invoke any presumption from Judge Holt's supposed possession of the paper as they have, for their purposes, conclusively shown it not to have been in his possession at the time of his death.

Judge Holt's habit of preserving papers, of burning nothing himself and not permitting others to burn anything, coupled with his preservation for forty-six years of his will of 1848, and the manner in which he indicated the revocation of that paper (Rec., p. 167), while not of controlling importance, are yet significant and certainly do not tend to

raise a presumption that he tore and burned this paper.

If this case were, as was supposed by the courts below, wholly unprecedented, it is submitted that no presumption that Judge Holt mutilated this paper can arise from the mere failure to show who did mutilate it. On the contrary, those who set up the revocation must affirmatively show that *he* did it.

But if a precedent be required, it is submitted that the case of Hitchings *vs.* Wood, in the Privy Council, presents a closer analogy than is usually found in decided cases. The amount there involved, more than ten times the amount in this case, the distinguished counsel engaged in its presentation and the able jurists who considered and decided it make it a safe guide to the decision of this case and it must follow that there is therefore no presumption that Judge Holt mutilated this paper.

No Evidence of Revocation and the Court Should Have so Instructed the Jury.

As before stated, in dealing with the question of revocation the original genuineness of the will must be assumed. Who therefore charges its revocation must prove that fact. This proposition was never disputed in the case and on the trial the court expressly imposed the burden of proof under this issue upon the caveators. How they discharged that burden will now be considered.

All of the evidence, notwithstanding the antagonistic character of the two issues offered by the caveators, was with a single exception offered and admitted upon both the issues tried in the case—forgery as well as revocation. The paper came into court burned and mutilated. During the whole progress of the trial not one scintilla of evidence was produced to connect Judge Holt with the paper in controversy, except that produced on behalf of the caveatees, tending to show that it was a genuine document and at one time his valid, subsisting will. All the energies of the caveators on

the contrary were limited to proving that it was a forgery, and had never been seen by Judge Holt. There is no evidence in the Record that any person burned or destroyed any paper, except the evidence proving that Washington Holt, Sterett, and Strothers burned some of Judge Holt's papers after his death, (Rec., pp. 48, 80, 87) and that during his lifetime Strothers burned a spoiled check (Rec., p. 87). There is therefore no evidence tending in the remotest degree to show that Judge Holt tore or burned *this paper*, nor tending to show that any other person did by his direction.

Allowing to all the evidence in the Record on behalf of the caveators upon this issue its utmost probative force, the most that can be claimed for it is that it tends to show that long after the date of the will Judge Holt entertained testamentary intentions different from the provisions of that paper, and that he had expressed himself as though he had made a will in favor of other persons than the beneficiaries named in the paper in controversy. No such will, however, was produced and no evidence was offered tending to show the execution of any such will nor was any attempt made to establish such a one as a lost will.

In dealing with this question of revocation the counsel for the caveators and the learned justice who presided at the trial lost sight of the fact that the evidence absolutely failed to connect Judge Holt in the slightest degree with the doing of any revocatory act to the paper in question. It was apparently assumed that the condition of the paper and its manner of appearance answered the purposes of such proof. The position of the trial justice in this regard, therefore, is entirely inconsistent with his conclusions above pointed out, that no presumption as to revocation attached to this paper. In other words, the caveators offered and the court, over objection and exception, admitted evidence of acts and declarations of the testator to show his intent in doing an act which they never proved that he did.

and which all the evidence offered by the caveators expressly negatived the possibility of his ever having done or been able to do.

It has already been shown in the statement at the head of this brief that evidence as to all of Judge Holt's life and his relations with his next of kin, the beneficiaries under the will and persons more or less remotely connected by affinity or consanguinity with any of them was admitted, and submitted to the jury upon both the issues in the case.

While not undertaking to review in detail this evidence it is deemed proper to call special attention to the evidence covered by the third assignment of error as an illustration of the extent to which the caveators pushed their claims to the admission of incompetent testimony and the indulgence in that regard accorded to them by the court.

In the cross-examination of the witness, Mrs. Ray (Rec., pp. 94–95), who is a niece of Miss Hynes, one of the beneficiaries under the will, evidence was admitted for the purpose of showing that her husband, Nick Ray, in October, 1884, became indebted to the testator and subsequently failed to discharge his obligation. Mrs. Ray was shown a paper, purporting to be a copy of a letter written by Judge Holt in 1886 to her husband, and though the witness testified on such cross-examination that she had never seen the original and did not know that her husband had ever received it, this paper accusing the witness' husband of "a deliberate breach of faith," was admitted in evidence over objection and exception—

> "upon the question whether or not under all the circumstances, the testator would have allowed such a will as that in controversy to stand under the *possibility* that some portion of the property which would pass thereunder *might ultimately* go to the said Nicholas Ray" (Rec., p. 95).

Nothing could be more palpably irrelevant to the question whether Judge Holt had revoked the will than this

letter in 1886 to Nicholas Ray, who was not in the remotest degree connected with the will and had not been examined as a witness in the case.

By the action of the court in admitting this letter in evidence, upon the grounds stated, the jury were in effect advised that they might find that Holt had recalled his bounty to Miss Throckmorton, if they believed he had subsequently conceived a dislike for an individual, not related to her, nor even connected with her by marriage, and of whose existence she was unconscious.

The obvious effect of this letter was to create an atmosphere of hostility towards one of the caveatees' witnesses which might, by inflaming the passions or prejudices of the jury, result in an adverse verdict.

Even if evidence of a revocatory intent on the part of Judge Holt had been admissible in this case, there could have been no warrant or excuse for the admission of anything so remote and irrelevant as this letter, and had the jury found for the caveators on this issue the judgment must have been reversed for the admission of this evidence alone.

All the testimony covered by the exceptions under the assignment of errors upon this issue will be found on examination to fall into two general classes:

1st. Alleged acts and declarations of Judge Holt, at various times subsequent to the date of the will, tending to show a change in his relations with and affections for the caveators and others of his relatives, on the one hand, and towards certain relatives of the beneficiaries under the will on the other.

2d. Alleged declarations of Judge Holt, claimed to have been made at times long subsequent to the date of the will, tending to show that he had probably made or intended to make a will differing in some of its provisions from that propounded.

If there were a presumption that the paper in controversy was revoked, as arises in the case of a mutilated will found

in the repositories of the testator at his death, every species of evidence tending to show the intent with which the presumed revocatory act was perpetrated would be competent to aid and support that presumption. Were that the case here, much, perhaps most of this evidence, would have been admissible. But in the absence of a presumtion in favor of revocation it can in no event become material to show a revocatory intent until a foundation has been laid by proving the doing of some revocatory act, for the evidence of intention is only competent for the purpose of explaining the reason for which an act is done. In what has gone before, it has been shown that the presumption attaching to the will in controversy is that it was burned and mutilated by some one other than Judge Holt, and, it must therefore be considered, until some evidence is produced that he or some one by his direction so mutilated it, as if it were entirely without any mutilation. But even in the view adopted by the trial justice that there was no presumption either in favor of or against the revocation of the instrument, it is inconceivable how evidence of the intent with which Judge Holt *might have* mutilated the paper could be received until it was proved that he had done the act resulting in mutilation. Under such circumstances, evidence of an intent to revoke a will is as immaterial to the issue under discussion, as in a murder trial would be evidence of a murderous intent when the defendant was shown not to have been within a thousand miles of the scene of the homicide. One cannot at present—though it is impossible to forsee what developments in this regard the 20th century may bring forth—build a house in the air without its ever touching and resting on some foundation; neither, it is submitted, can one in a court of law prove the doing of an act by showing an intention or even a desire, however strong, to carry the act into effective execution.

It thus becomes, it is submitted, a matter of demonstration that there is not in this Record a particle of competent

evidence upon this issue of revocation. It was therefore the plain duty of the trial court to have so instructed the jury and to have withdrawn this issue as well as the issues of fraud and undue influence from their consideration. The third, fifth and sixth prayers of the caveatees, covered by exceptions Nos. 31, 32 and 33 (Rec., p. 122) under the fifth assignment of error, in legal effect requested the court to instruct the jury that there was no evidence of revocation and that they must find accordingly. These prayers should have been granted, and in refusing them the court committed error.

The twelfth and thirteenth prayers of the caveatees, covered by exceptions Nos. 34 and 35 (Rec., pp. 122, 123) under the fifth assignment of error in effect requested the court to instruct the jury that there was no evidence tending to show that Judge Holt had revoked the paper in controversy by the execution of a later, inconsistent will. In refusing these prayers the court below again committed error.

In granting the fourth prayer of the caveators covered by exception No. 25 (Rec., p. 120), under the fourth assignment of error, the trial court in effect instructed the jury that from the evidence before them tending to show a change in Judge Holt's feelings toward and relations with some of his next of kin, the beneficiaries named in the paper in controversy, and all persons nearly or remotely connected with any of them by affinity or consanguinity, they could find that the paper had been put in the condition in which it was produced, by Judge Holt or some other person under his direction. In other words, from the evidence of alleged inconsistent motives they were at liberty to find that he did a revocatory act. In granting this prayer it is clear that the court committed error.

The caveators seem to have attached special importance to the fact that this paper purporting to be "signed and sealed" by Joseph Holt did not when produced bear a seal.

In their seventh prayer, covered by exception No. 26 (Rec., p. 120) under the fourth assignment of error, they requested the court to instruct the jury that, if they should find that the paper was both signed and sealed by Judge Holt and he afterward removed or caused to be removed such seal *animo revocandi*, then they should find the fourth issue in the affirmative. This instruction is open to the same objection as the one last above referred to, viz., that the jury were permitted to find that Judge Holt did an act, to wit, the removal of the seal from this paper, if they thought he intended to revoke it, in the absence of any proof whatever that the will ever had a seal, or, if it had, who it was that removed it, and in granting this instruction the court again committed error.

It is finally submitted that there was no evidence competent to go to the jury on this issue of revocation and that the jury should have been so instructed. There remains, then, only the opinion of the Court of Appeals, on this branch of the case, to be considered under this issue.

The Opinion of the Court of Appeals on the Questions Arising Under the Issue of Revocation.

In considering the disposition made by the Court of Appeals of the exceptions taken to the rulings of the trial court upon the issue of revocation it is important to bear in mind the contention of the caveatees, who were the appellants in that court.

They contended that the acts and declarations of the testator, indicating his intentions or state of mind were inadmissible to prove revocation. With this contention the Court of Appeals agreed, saying (Rec., p. 154):

> "If the will had been found among the papers of the testator unmutilated, the evidence would clearly have been incompetent to prove revocation as an independent fact."

The caveatees admitted that if the mutilation of the

paper apparent on its face had been done or authorized by the testator, most of the testimony admitted would have been competent.

But they insisted that there was no affirmative evidence that the testator did or authorized the acts of mutilation and that no presumption that he did so could be indulged, because not found in his possession and because the circumstances of its appearence showed that it had been improperly dealt with since the testators' death.

The portion of the court's opinion on this branch of the case is quite brief and the essential propositions are embraced in the following quotations (Rec., p. 154):

> "It seems to us quite clear, both on principle and authority, that this evidence . . . was competent as tending to maintain the issue of revocation.
>
> "If the will had been found among the papers of the testator unmutilated, the evidence would clearly have been incompetent to prove revocation as an independent fact. If it had been there found in its present condition, the presumption of revocation would at once attach. Coming to light at the time and in the manner in which this paper did, we are not sure but that the same presumption of revocation ought to be indulged.
>
> . . . . . .
>
> "In consideration, then, of the condition of the will, and the manner in which its appearance was made . . . the state of mind of the testator, during the more than twenty years in which the will was subject to his unrestrained control . . . was a material circumstance to be considered by the jury in determining whether the mutilation was the result of an intent to revoke."

Whether, by these observations, the court intended to decide that, though not free from doubt, the condition of the paper and the manner of its appearance raised a presumption that Judge Holt mutilated it, or that, refraining

from a decision of that question, the evidence as to the intentions and state of mind of the testator during the time the will was subject to his control was competent affimative evidence, without the aid of any presumption, that Judge Holt mutilated the will, is by no means clear.

As the whole strain of the case on revocation falls on these propositions, this uncertainty in the position of the Court of Appeals is to be regretted.

But whichever view is intended, it is, with deference, respectfully insisted that not one of the eleven cases cited as sustaining its conclusions gives any semblance of support to either position. No one of the cases cited decides that facts such as are here disclosed raise a presumption that the mutilation was done by the testator; no one of them decides that the declarations of a testator can raise such a presumption. Declarations are admitted to *support* or *rebut* presumptions, not to *create* them.

No one of the cases cited decides that evidence of intention and opportunity to revoke is competent affirmative evidence of mutilation by the testator.

A review of the cases cited will amply justify these criticisms.

The first of these cases is Lawyer *vs.* Smith, 8 Mich. 411 (1860).

A will, dated in June, 1824, and made under an antenuptial agreement of November 28th, 1820 (p. 411) was offered for probate. It was torn in several pieces and was resisted on the ground of revocation. Some years before her death, but after the date of the will, testatrix was adjudged a lunatic and one Maynard was appointed her guardian. One of the appraisers appointed in the lunacy proceeding to make an inventory of her estate testified to the confusion in which her papers were kept. They were found—

> "scattered and mixed promiscuously with other things. No one place in particular for anything. In the

> middle of a chest, packed with bed clothes we found some money tied up" (p. 419).

Her effects were gathered up by the appraisers and others and delivered to the guardian, Maynard. Some of them, including a barrel of papers, were deposited in a wooden building near Maynard's store. The torn will was found in this barrel among a lot of waste papers, newspapers, pamphlets and some old letters *together with the ante-nuptial contract under which the will was made,* all being in the custody of her guardian (pp. 416, 417).

Here, then, was the clearest case of the finding of the mutilated will among the testatrix's papers and other effects —in her possession—and there was therefore a presumption that the mutilation was done by her, and the case, in principle, is not different from one in which a mutilated will is found in the most private repositories of a testator. The court, per Manning, J., held that the condition of the paper was evidence of violence—

> "but whether done by the testatrix or some other person, and, if done by her, whether accidentally or intentionally and for the purpose of revoking her will, were questions of fact to be determined by the jury. To aid them in arriving at a correct conclusion on these points, and not as separate and independent evidence of a revocation," (p. 424).

the declarations were therefore relevant and plainly admissible to support the presumption of revocation arising on the facts.

In Patterson *vs.* Hickey, 32 Ga., 156 (1861), a mutilated will was found in the *testator's bureau drawer.* In support of the presumption arising from this fact that the will was revoked, the caveators offered testimony tending to show that the testator entertained testamentary intentions different from those expressed in the will. The court below excluded this evidence, Lumpkin, C. J., for the Supreme Court, however, (p. 160) held this to have been error, and that this evi-

dence was admissible to support the legal presumption that the will had been revoked, (pp. 159, 160) and also as explaining the intent with which the mutilation was done (p. 160.)

In Burge *vs.* Hamilton, 72 Ga. 568 (1884), the question was whether a statement made by the testator to a scrivener of a codicil to his will, *at the time of its execution*, was admissible to show that ten pages of writing attached together formed his will, there being some confusion on account of an erroneous statement in that paper of the number of pages of which it consisted (p. 619). This evidence was plainly admissible to identify the paper and to explain the ambiguity apparent on its face, (p. 629), as well as being of the *res gestae*, and was so held (p. 634).

The Court of Appeals apparently only cites this case in support of Patterson *vs.* Hickey, for the opinion refers to page 625, which is wholly taken up with a quotation from that case.

In Collagan *vs.* Burns, 57 Me. 449 (1870), a will consisting of fragments pasted together was produced *from the repositories of the testator* and propounded. The presumption clearly was that the mutilation was done by the testator (p. 453). The questions were whether declarations of the testator *made when pasting the fragments together and reading from the paper when they had been so arranged*, to the effect that his mother in law had mutilated the will (pp. 457–458) and declarations made later that he had given the principal beneficiaries under this will all of his estate (p. 461) were admissible or not. The probate court held the will to have been revoked, but upon the trial the jury found that no revocation had taken place, and on appeal judgment on the verdict was directed by a divided court. Appleton, C. J., held that evidence of these declarations and acts was admissible to rebut the presumption of revocation arising upon the facts (pp. 458, 461) and that the first declarations were admissible as well, being of the *res gestæ* (p. 459).

In this opinion three of the justices concurred. Walton J. delivered a dissenting opinion, concurred in by three judges, holding the evidence inadmissible, while Dickerson J., the ninth member of the court, delivered a separate opinion also holding the evidence inadmissible.

The case of Collyer *vs.* Collyer, 110 N. Y. 481 (1888), was that of a lost will which it was claimed had been fraudulently destroyed. The court held that there was a presumption the will had been destroyed by the testatrix *animo revocandi*, (p. 486), resulting from the fact that it was shown to have been in her possession and could not be found after her death, and evidence of the declarations of the testatrix was considered as supporting and rebutting the presumption arising upon the facts of the case that the will had been destroyed by her.

This case came up on appeal from a judgment of a surrogate, and the court sat as judge, both of the law and the facts. It cannot, therefore, be regarded as an authority upon any question of evidence. Indeed, the Court of Appeals expressly denies any intention of ruling upon the evidence, saying (p. 487):

> "As the evidence on the part of the petitioner wholly failed to make out his case, he was not harmed by any of the evidence offered and received on behalf of the contestants to which he makes objections, and such objections need not, therefore, be considered."

In McDonald *vs.* McDonald, 142 Ind. 55 (1895), the presumption of destruction by the testator arose from the fact that the will was not forthcoming at the testator's death, and the declarations were admitted to rebut that admitted presumption (p. 83) and to show the contents of the lost will (pp. 83, 84).

This clearly appears, by reference to page 81 of the report, the portion cited by the Court of Appeals:

> "These declarations of the testator the court per-

> mitted this witness to give to the jury. Appellants at the time objected to them being admitted as evidence, upon the grounds that there was no issue upon mental incapacity, and, second, that they were not admissible for showing the contents of a lost or destroyed will, because there had been no evidence of the execution of any such will. But upon appellees stating to the court that there would be evidence of the execution of the alleged lost will, the objection was overruled. The contention of the learned counsel for appellants is, that these declarations went to the jury for all purposes, and upon all the issues in the case, without limitation. It is settled in this State that the declarations of a testator made at a time other than when the will was executed, are not admissible in an action of contest upon the issue of fraud, or undue influence. Runkle *vs.* Gates, 11 Ind. 95; Hayes *vs.* West, 37 Ind. 21.
>
> "But it is evident, we think, from the instructions of the court to the jury, that the declarations were admitted in evidence, and the jury permitted to consider them for the purpose only of showing the contents of the alleged lost or destroyed will, and whether, if such a will ever existed, it remained unrevoked at the death of the testator."

In Miller *vs.* Phillips, 9 R. I. 141 (1869), there was no mutilation of the will but a presumption of revocation resulted from the admitted act of the testatrix, namely her marriage. It was held by the court that under the law of Rhode Island this presumption from marriage was not conclusive, but was rebuttable like other presumptions, Potter, J., for the court, saying (p. 144):

> "And the evidence that the testatrix spoke of her will, we think, was properly admitted. Although there was for a time a great conflict of authority on the question whether parol evidence could be admitted in order to rebut the presumption of revocation, we consider the weight of authority now to be strongly in favor of its admissibility."

In re Valentine's Will, 93 Wis. 45 (1896), the contents of

a lost will were propounded for probate, the will having been last known to be in the possession of the testatrix, and not being forthcoming upon her death. Cassody, C. J., held (p. 55) declarations of the testatrix that she had destroyed her will to be admissible as tending to prove—

> "that she died in the belief that she had left no will, and thus support the presumption of revocation arising from the fact that it was last known to be in her possession but could not be found upon her death."

In Pickens *vs.* Davis, 134 Mass. 252 (1883), the questions were (p. 253), first, whether cancelation of a will revoking a former will revives such former will as matter of law, or whether it becomes a question of intention to be gathered from the whole case, and second, if it be a question of intention, whether subsequent declarations of a testator are admissible to explain what his intention was. It was held (pp. 256, 257) that, whether the former will were revived or not, was a question of intention, and that declarations were admissible to show and explain such intention.

In the well-known case of Sugden *vs.* Lord St. Leonards, L. R. 1 Prob. Div. 154 (1876), the questions were, as stated by Sir J. Hannen in the court of first instance (p. 175):

> "First, what were the contents of the will, which it is admitted was duly executed and attested upon the 13th of January, 1870; and secondly, was that will revoked, was it destroyed by the testator *animo revocandi*."

and as stated by Cockburn, C. J., on appeal (p. 217):

> "In the first place, was the will destroyed by the testator *animo revocandi*, or not; secondly, can secondary evidence be given of its contents; thirdly, if so, have we satisfactory evidence of the contents; and lastly, if the evidence is satisfactory so far as it goes, but not altogether complete, ought probate to be

> granted so far as the evidence which we have before us shews what were the contents."

It was proved that Lord St. Leonards had duly executed the will and it was known to have been in his possession five months before his death, but, on his death, was not forthcoming; the presumption that he had destroyed it arose from its non-production at his death. The trial court pronounced in favor of the propounders of this lost will (p. 206), and that judgment was affirmed on appeal.

It was held, that, on the state of facts in the case, the presumption arose that the will had "been destroyed by the testator for the purpose of revoking it" (p. 217); and that this presumption could be rebutted by parol evidence tending to show that up to the very time of his death his intentions remained the same as expressed in the will (p. 217). And it was also held that parol evidence was admissible to prove the contents of the lost will (p. 220), Cockburn, C. J., saying (p. 229):

> "I am, therefore, of opinion that the various statements of Lord St. Leonards, whether before or after the execution of his will, are admissible to prove it contents."

In Gould *vs.* Lakes, L. R. 6 Prob. Div. 1 (1880), the last case cited by the Court of Appeals, the question was whether both of two sheets of paper or only one of them constituted the will of the testatrix. It appears by the statement of facts in the report (p. 2) that:

> "On the death of the deceased, her will was *found in her writing desk* in an envelope, which had been apparently thrice opened and resealed. *With the exception of the attestation clause, it was all in her own handwriting*, and contained in *two sheets* of old-fashioned note-paper, one within the other and *stitched together* book-wise."

Declarations of the testatrix tending to show that she con-

sidered both these papers as her will was admitted by Sir James Hannen on the supposed authority of Lord St. Leonard's case. The finding of these papers in the condition and place as found would certainly raise the presumption that the annexing of the papers was her act, and her declarations tended to support that presumption.

From the foregoing review of the cases cited by the Court of Appeals, it becomes a demonstration that no one of them supports either position, as above indicated, in the court's opinion, while the principles which they do decide were never questioned at any stage of this litigation.

Reference is made, by the Court of Appeals, to the gift of ten thousand dollars to Miss Hynes as "an independent provision for the remaining legatee, for whom his affection remained unabated" (Rec., p. 154).

Of course the force of this evidence if competent in the case for any purpose was wholly for the jury, but it is not impertinent to recall the fact, that of the nine caveators in this case, Washington Holt, and his family, are the only persons whom any evidence in the Record connects with any purpose of Judge Holt to be a sharer in his estate.

Is it not quite plausible, especially in view of the evidence of his letter and declarations respecting Miss Hynes, which is equally credible, that in giving to the family of Washington Holt over fifty-three thousand dollars, or more than one-third of the estate in controversy, he was liberally providing for them in his life time in lieu of any testamentary provision in their behalf, thereby avoiding any necessity for changing his existing will? And is not the reasonableness of this view increased by the failure to discover among the carefully preserved papers of Judge Holt any will in favor of this much beloved kinsman?

Had such a will been discovered Washington Holt would certainly not have destroyed it nor permitted Sterett or Strothers to do so while burning the other papers of Judge

Holt, which in his judgment so urgently required immediate destruction.

The contention of the caveators in the Court of Appeals and the straits to which they were driven is well illustrated by the following quotation from their brief:

> "He, therefore, who offers a will for probate asserts, not only that the testator made it originally, *but that it continued to be the purpose of his life ever afterwards* that that instrument should take effect at his death. Now, this is a mental condition."

To this amazing proposition is opposed the ruling in Cheese *vs.* Lovejoy, L. R. 2 Prob. Div. 253.

> "All the destroying in the world without intention will not revoke a will, nor *all the intention in the world without destroying; there must be the two.*"

and also the language of Boyle, C. J., in Gains *vs.* Gains, 2 A. K. Marsh, 191: "We can not *under any circumstances, substitute the intention to do the act for the act itself*," and the multitude of decisions, a few of which are cited *supra* (pp. 70–79), holding that mere intention to revoke is wholly ineffectual.

THE ISSUE OF FORGERY.

The Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and Twelfth Assignments of Errors.

Under this head will be considered the exceptions taken to the admission of evidence and to the instructions of the court with reference to the issue of forgery.

In the consideration of this branch of the case it is to be borne in mind that the caveatees who had the affirmative of this issue in their case in chief confined their offers of evidence to proof of handwriting and to the fact that all the parties interested under the will had no knowledge of it prior to its receipt by the Register of Wills (Rec., pp. 20–28).

In rebuttal of this the caveators insisted upon giving in evidence alleged declarations and acts of the testator, tending, as they claimed to show his state of mind, feelings and intentions with respect to certain of his next of kin and their connections and certain persons more or less remotely connected by affinity or consanguinity with the parties named in the will, the most, if not all of this evidence relating to a period of time from seven to twenty years after the date of the will.

All of this evidence was specifically offered upon both the issues of revocation and forgery, counsel for caveators in response to caveatees' objections saying (Rec., p. 32):

> "We are offering this both upon the question of the genuineness of the will and upon the question of revocation."

And again (Rec. p. 39):

> "We would like to have it understood that we offer it for both purposes—both on the question of forgery and on the question of revocation."

Though objected to as incompetent upon either issue (Rec., pp. 29, 31, 32, 39), it was admitted upon both.

Indeed, not only was this evidence offered and admitted for the purpose of proving the will to be a forgery, but the court, in effect, told the jury that all the evidence offered in the cause was competent for that purpose. In charging the jury the court said (Rec., p. 131):

> "That is to say, from the photograph that you have had of the character and attainments of Judge Holt by the evidence in this case, either by his own letters or by the oral evidence of witnesses, you may judge whether it is likely or not that Joseph Holt would have composed and written the paper in controversy. . . . You are also to consider the circumstance touching the relations of Joseph Holt to all the parties to this controversy, the next of kin, the people of his own blood, and the devisees under this

> will, up to the time of the date of this will, bearing directly upon this question, whether it would be likely that he would have made such a will at that time, and also the subsequent conduct of the testator towards his next of kin or heirs at law, and as well towards the beneficiaries under this will, as bearing upon the probability, the likelihood of his having made such disposition of his estate as is made by this paper in controversy.
>
> "If, upon the consideration of *all* of this evidence, you reach the conclusion that this paper is not established to your satisfaction as the genuine paper of Joseph Holt, your answer to this first issue should be 'No.'"

This part of the charge, excepted to by the 36th, 37th and 38th exceptions (Rec., pp. 141, 142), comprehended all the evidence in the cause, including that which had been offered and admitted to prove revocation, so that the jury was instructed that all the evidence which was admitted upon the one ground or the other, was proper for their consideration as tending to establish the claim of forgery.

The Court of Appeals took the same view here contended for as to the effect of this part of the charge, saying (Rec., p. 153):

> "We think it sufficiently appears from a paragraph of the general charge, taken in connection with the express purposes for which the evidence was offered, that it was intended to bear distinctly also upon the issue of execution."

Indeed, the only evidence in the case withdrawn from application to the issue of forgery was that relating to the controversy between Judge Holt and Nick Ray, which, by the eleventh instruction (Rec., p. 135), was confined to the issue of revocation.

It has already been shown that under the circumstances of this case none of the evidence objected to was competent upon that issue. Under the rules of evidence it was also in-

competent under this issue, while considered logically, its admission was less excusable.

By the admission of this evidence and its submission to the jury in the manner shown by the Record, the jury were in effect told that if the evidence of the alleged acts and declarations of the testator, in the later years of his life, showed a change in his state of mind so far inconsistent with the provisions of this will as to justify the belief that he intended to revoke it, they could, at their option find either that he revoked it or that he never in fact executed it.

Furthermore, the admission of such evidence, upon an issue of forgery, authorizes the jury to set aside the will unless the testator, by his public acts and declarations evinces the intentions expressed in his will. The enforcement of such a rule will at once put an end to the right of testators to privacy as to their testamentary acts and imposes upon them, as a condition to the validity of their wills, the obligation to make public proclamation of their intentions. It is submitted that this is a new and dangerous doctrine, not supported by authority, and one which this court should take this opportunity to suppress.

It is submitted that the better principle is that expressed by the Court of Appeals of Maryland through Le Grand, C. J., in Cramer *vs.* Crumbaugh, 3 Md. 499:

> "Experience not unfrequently informs those, who have encountered the trials and vicissitudes of a long life, that kindness is to be received not only at the hands of those who are our kindred in blood, and that such, by their conduct, may forfeit all claim upon their bounty. The observation of every sensible man must notify him, that a person may have very satisfactory, and, to himself and the world, justifiable reasons for disinheriting his kindred, but *which he would be unwilling to make matter of record.* From a becoming and praisworthy respect to the feelings of the living, *a testator is properly dispensed*

from the necessity of assigning the motives which govern him in the selection of the objects of his bounty."

This Class of Evidence Generally Inadmissible.

Before considering the question of the admissibility of declarations and acts of the testator as applicable to this issue, it is advisable to note the general rule established by the courts with respect to the admissibility of such evidence.

The principle upon which such declarations and acts are admitted and the purpose for which admitted have been frequently considered and discussed by the courts, and the conclusions reached are fairly harmonious.

It is unnecessary to refer to a large number of such cases but attention is invited to the following, in which the question has received most careful and philosophical examination and decision, and which, it is believed present the best exposition of the general rule.

The Court of Appeals of New York in the case of Waterman *vs.* Whitney, 11 N. Y. (1 Kernan) 157 (1854), had this question before it. Selden, J., delivering the opinion of the court says (*p. 160):

> "The principal question presented by the bill of exceptions in this case is, as to the admissibility of the declarations of the testator made *after* the execution of the will.
>
> "The subject to which this question belongs is of very considerable interest, and one upon which the decisions are to some extent in conflict. Much of the difficulty, however, has arisen from the omission to distinguish with sufficient clearness, between the different objects for which the declarations of testators may be offered in evidence, in cases involving the validity of their wills. It will tend to elucidate the subject to consider it under the following classification of the purposes for which the evidence may be offered, viz.: 1. To show a revocation of a will ad-

mitted to have been once valid. 2. To impeach the validity of a will for duress, or on account of some fraud or imposition practiced upon the testator, or from some other cause, not involving his mental condition. 3. To show the mental incapacity of the testator, or that the will was procured by undue influence. The rules by which the admissibility of the evidence is governed, naturally arrange themselves in accordance with this classification. They have, however, been considered in most of the cases without regard to it; and hence much of the apparent conflict among them will disappear, when the proper distinctions are taken.

"To show the state of the authorities, therefore, and what the differences really are between them, it is necessary to arrange the cases according to this arrangement of the objects for which the evidence is given. In referring, however, to those belonging to the first of these divisions, it is proper to premise, that the revocation of a valid will is a matter which, not only in England, but in this State, and in most if not all, the other States, is regulated by statute; and these statutes are substantially the same; those in this country being for the most part taken from the English Statute of Frauds. Most, if not all, these statutes require either a written revocation executed with the same formalities as the will itself, or some act amounting to a virtual destruction of the will, such as burning, tearing, obliterating, &c., accompanied by an unequivocal intention to revoke it. Mere words will in no case amount to a revocation.

"Under these statutes, therefore, the only possible purpose for which evidence of the declarations of the testator can be given, upon a question of revocation, is to establish the *animo* (*sic*) *revocandi*, in other words, to show the intent with which the act relied upon as a revocation was done. The cases on this subject are in the main in harmony with each other, and in general entirely accord with the view here presented."

He then summarizes the doctrine as to the admissibility

of declarations of the testator in the following language (*p. 162):

> "I consider these cases as establishing the doctrine that upon a question of revocation, no declarations of the testator are admissible except such as accompany the act by which the will is revoked; such declarations being received as a part of the *res gestæ*, and for the purpose of showing the intent of the act.
>
> . . . . . .
>
> "In regard to the second class of cases, viz., where the validity of a will is disputed on the ground of fraud, duress, mistake or some similar cause, aside from the mental weakness of the testator, I think it equally clear that no declarations of the testator himself can be received in evidence except such as were made at the time of the execution of the will, and and are strictly a part of the *res gestæ*."
>
> . . . . . .
>
> (*P 164): "These cases must, I think, be sufficient to establish the position, that declarations of a testator, made either *before* or *after* the execution of the will, are not competent evidence to impeach its validity, on the ground of fraud, duress, imposition or other like cause."

Finally he adds (*p. 165):

> "I have referred thus particularly to these numerous cases, in which the declarations of testators have been held *inadmissible* upon contests respecting the validity of their wills, for the purpose of showing that they all apply to one or the other of the first two of the three classes into which I have divided the cases on the subject. None of them have any application to cases in which the will is assailed on account of the insanity, or mental incapacity of the testator at the time the will was executed, or on the ground that the will was obtained by undue influence.
>
> "The difference is certainly very obvious between receiving the declarations of a testator to prove a

> distinct external fact, such as duress, or fraud, for instance, and as evidence merely of the mental condition of the testator. In the former case, it is mere hearsay, and liable to all the objections to which the mere declarations of third persons are subject; while in the latter it is the most direct and appropriate species of evidence."

In Mooney *vs.* Olsen, 22 Kan. 69 (1879), a will was contested, the issues being mental incapacity and undue influence. Evidence of the declarations of the testatrix made some time prior to the date of the will were introduced. Speaking of such declarations, Mr. Justice Brewer, then a member of the Supreme Court of Kansas, delivering the opinion, says (p. 76):

> "Much of the testimony above referred to was properly admitted as part of the *res gestæ*,—as matter surrounding the execution of the will, and properly throwing light upon the mental condition of the testatrix, and the influences under which she was acting. So far as her prior statements are concerned, they were properly admitted, but under a different rule and not as part of the *res gestæ*. It is sometimes broadly stated that the declarations of a testator, whether prior or subsequent to the execution of the will, are inadmissible for the purpose of impeaching it. In a certain sense this is doubtless true. As a mere matter of impeaching the will they are hearsay and inadmissible. They are not like statements of an ancestor in derogation of title or limitation of estate, which being declarations against interest are admissible against the heir, for there is no adverse interest in a devisor against the will or the devisee. They are more like declarations of a grantor, after grant, in limitation of his grant and are strictly hearsay. Thus, if a testator after executing a will, should say that the will was forced from him or that it was executed against his will, and through undue influence, such statement of itself would be hearsay and inadmissible. Jackson *vs.* Kniffen, 2 Johns. 31; Stevens

vs. Van Cleve, 4 Wash. C. C. 265; Hayes *vs.* West, 37 Ind. 21."

He then quotes from 4 Wash. C. C. and continues:

"But while declarations are not admissible as mere impeachment of the validity of a will, they are admissible as evidence of the testator's state of mind. A man's words show his mental condition. It is common to prove insanity by the party's sayings as well as by his acts. One's likes and dislikes, fears and friendships, hopes and intentions, are shown by his utterances; so that it is generally true that, whenever a party's state of mind is a subject of inquiry his declarations are admissible as evidence thereof. In other words, a declaration which is sought as mere evidence of an external fact, and whose force depends upon its credit for truth, is always mere hearsay if not made upon oath; but a declaration which is sought as evidence of what the declarant thought or felt, or of his mental capacity, is of the best kind of evidence."

In Shailer *vs.* Bumstead, 99 Mass. 112 (1868), Colt, J., after holding that the declarations of the testator were admissible to show mental condition, tersely states the principle thus (p. 120):

"*The truth or falsity of the statement is of no consequence.* As a narration it is not received as evidence of the facts stated. *It is only to be used as showing what manner of man he is who makes it.*"

In Marx *vs.* McGlynn, 88 N. Y., 357 (1882), diaries of testatrix were introduced to sustain the issue of undue influence.

Earl, J., speaking for the court, says (p. 374):

"I have thus far considered this question as if the diaries and letters introduced in evidence by the contestant were evidence of all the facts stated in them. It was held by the Surrogate and by the Supreme Court at General Term that they were not,

and we are of that opinion. They are in the nature of hearsay evidence, declarations of the deceased which are incompetent for the purpose of defeating or destroying the will, or any of its provisions. They are competent only as bearing upon the condition of the mind of the testatrix at the time of the execution of the will. Such memoranda or declarations, whether made before or after the execution of a will, are competent as bearing upon the testator's mental capacity. They are also competent as bearing upon the condition of the testator's mind, with reference to the objects of his bounty. They may be given in evidence for the purpose of showing his relations to the people around him, and to the persons named in his will as beneficiaries. They are, however, entitled to no weight in proving external acts either of fraud or undue influence."

In Griffith *vs.* Diffenderfer, 50 Maryland, 466 (1879), Robinson, J., for the Court of Appeals says (p. 480):

"The questions arising under the third exception are of considerable importance in the trial of testamentary cases, and not altogether free of difficulty. How far, and for what purposes, the *declarations* of *a testator* made *after* the execution of his will, may be offered in evidence, under *issues of fraud and undue influence*, the decisions are conflicting. We do not propose to examine the many cases in which the subject has been considered, for this has already been done in Waterman *vs.* Whitney, 1 Kernan, 168, and Boylan *vs.* Meeker, 4 Dutcher, 274, and other cases, and it is unnecessary for us to do more than state the conclusions we have reached.

"Where such declarations are made so remote as not to constitute a part of the *res gestæ*, they cannot be offered as independent evidence to prove the charge of fraud or to show the *external acts* of undue influence, or attempts to influence the testator to make a will in a particular direction.

"If offered for this purpose, they are inadmissible on two grounds: 1st. As mere hearsay evidence,

which, by reason of the death of the party whose statement is offered, can never be explained or contradicted by him. 2d. It is inconsistent with the Statute of Frauds to permit a will, executed with all the formalities required by the statute, to be impeached or its validity in any manner impaired by the parol declarations of the testator made after the execution of the will.

"But the question whether a will is the free and voluntary act of the testator, or the offspring of fraud, whereby his judgment was misled, or of influences operating upon him, in consequence of which his will was made subordinate to that of another, depends upon whether he had intelligence enough to detect the fraud, and strength of will enough to resist the influences brought to bear upon him.

"The character and degree of the fraud practiced and the influence exerted, involve therefore necessarily to some extent the physical and mental condition of the testator at the time of the execution of the will."

. . . . . .

(P. 481): "Any evidence, therefore, which tends to prove the precise mental condition of the testator, and to place him before the jury just as he was when the will was made, is admissible. And for this purpose the declarations of a testator may, in some cases, be the most satisfactory proof.

. . . . . .

"We are of opinion, therefore, that the declarations of the testatrix to Mary Whitman in November, 1876; 'that she had made a will,' 'that she was dissatisfied with it,' 'that she had been persuaded to make it,' 'that she was sorry she had not let the law make a will for her, as it had for her husband, so that the children would have shared alike,' 'that she had done great injustice to her other children and to her grandchildren,' naming them; 'and was troubled about it' and 'sometimes tempted to destroy it,' and other like declarations, were admissible *for the purpose of proving the mental condition of*

the testatrix at the time of the execution of the will and codicil, but for no other purpose."

In Gibson *vs.* Gibson, 24 Mo. 227 (1857), declarations of a testator made two or three years after the date of the will to the effect that "he had never made the will, that if he had signed it they had got him drunk and made him do it, for he had no recollection of it" were offered on the issue of undue influence.

Leonard, J., delivering the opinion of the court, says (p. 228):

> "Upon an issue of 'will or no will' the declarations of the alleged testator are offered in evidence—sometimes as part of the transaction—sometimes as verbal acts (as they have been called) indicating the mental condition of the testator—and at other times as a mere narrative of facts, entitled to credit as such on account of the relation of the speaker to the subject-matter. Whenever the declarations can be considered as falling within the first class of cases, they are of course admissible, upon the common doctrine of the *res gestae* and the only question then is, whether they are so connected with the main fact to be proved as to fall within the rule. They are also clearly admissible when the condition of the testator's mind is the point of contention, or it becomes material to show the state of his affections, and they are then received as external manifestations of his mental condition, and not as evidence of the truth of the facts he states. *For this purpose, and as a mere narrative of facts, we do not think they ought ever to be received,* and this seems to be the general doctrine of the authorities, although there are certainly conflicting decisions on the subject."

In Cawthorne *vs.* Haynes, 24 Mo. 236 (1857), declarations of the testator, made before and after the date of the will, were offered to the effect that certain legatees under the will "should never have any of his property," and that "he had no will."

Leonard, J., in the course of his opinion, says (p. 238):

"The declarations made after the date of the will were relied upon, we suppose, respectively, as direct and implied assertions that the party had never made a will, or that, if he had, it had since been revoked; and the case of Gibson *vs.* Gibson [24 Mo. 227], already referred to, settles that if relied on for this purpose, they are mere hearsay and wholly inadmissible."

. . . . . .

(P. 239) "We are clearly of opinion that the declared purpose of the testator that these children should not share his bounty, made before and repeated after the date of the will, wholly unsupported as it was by any evidence whatever of incapacity or undue influence, would not have justified the jury in point of law, in finding against the will. We do not mean to say merely that, under the circumstances, the evidence was insufficient, in point of fact, to produce conviction; but to declare, as a matter of law, that the declarations, alone and unsupported by other facts, did not furnish any legal evidence whatever of the testator's alleged incapacity, or of undue influence, and of course their exclusion furnishes no ground whatever for reversing the judgment."

In Thompson *vs.* Updegraff, 3 W. Va. 629 (1869), undue influence was sought to be established.

On the trial, the defendants, over objection and exception, proved that testator had stated that two of the devisees under the will did not wish him to give anything to one of his sons; this "evidence was offered for the purpose of proving the declarations of the devisees" (p. 632). Maxwell, J., held this error, and says (p. 637):

"The authorities fully sustain the position that such declarations are admissible in evidence for the purpose of showing the state, condition and operations of the mind of the testator, at the time of the execution of the will.

. . . . . .

"It was therefore proper that the evidence of the

declarations of the testator should go to the jury, to be given by the jury such weight as they might see proper, for the purpose of showing the state, condition and operation of the mind of the testator, but for no other purpose. This class of evidence is dangerous in its character and is to be received with great caution. The only legitimate purpose of this sort of evidence is to show a condition of mind in which its free agency may be easily overcome by the improper influences of those surrounding the testator, and to lay the foundation for the introduction of other and more direct testimony showing that such improper influences were in fact exerted. The declarations themselves are no evidence that improper influences were exerted.

"If the declarations of the testator had been proved for the purpose of showing the condition of his mind, such evidence would have been properly admitted. But the bill of exceptions expressly negatives this idea and certifies that the evidence was offered for the purpose of proving the declarations of the devisees, for which purpose, as before stated, it was clearly improper and should not have been admitted."

In Couch *vs.* Eastham, 27 W. Va. 796 (1886), on an issue of *devisavit vel non*, proponents offered to prove declarations of the testator before and after execution of the will that he intended to make and had made his children equal, the alleged will discriminating between them.

Johnson, President, held such evidence inadmissible, saying (p. 799):

"The question we are now considering is: Upon an issue of 'will or no will,' can the declarations of the testator made before and after the execution, so far removed therefrom as to form no part of the *res gestæ*, be admitted to prove that the will was executed by mistake?"

He then reviews the authorities and says (p. 804):

"If such declarations could be admitted to prove

that the will was procured by fraud or duress or mistake, no man's will would be safe. The temptation to disappointed seekers after the testator's bounty to watch the testator, and, as his mind grew weaker, to tamper with him and induce him to make declarations that were inconsistent with the will, would be sufficient to induce unscrupulous persons to do such miserable work and even to go farther and suborn witness to swear to imaginary declarations of the testator inconsistent with the terms of his will pretended to have been made both before and after the will was executed. The statute which requires the will to be in writing and properly witnessed, would afford but little protection to the testator or to the real objects of his bounty, if proof of such declarations could be admitted."

The conclusions reached in these cases will be found upon examination to be adopted by the text writers as presenting the state of the law on this important subject.

Thus, Redfield, in his work on wills (1 Redf. on Wills., *p. 557) adopts the decision in Boylan *vs.* Meeker, saying:

"The case of Boylan *vs.* Meeker is one of considerable interest upon this point. The cases are more thoroughly reviewed there than in any other place which has fallen under our notice. The points decided are thus stated: The conduct and declarations of the testator, both before and after he executed the will, are competent evidence to show his want of capacity at the time the will was executed, where the issue is upon the sanity of the testator; but after the will is made, such conduct and declarations, manifesting ignorance of the existence of the will, are not competent to show that the testator had never made the will in question. And where the execution of a will is proved in the mode required by law, the declarations of the testator, made before or after the execution of the instrument, are not competent to prove fraud, duress, or forgery, or to disprove the execution, they are hearsay merely; but such declarations, made at the time the instrument was executed, are

admissible as part of the *res gestæ*. The rule upon these points is the same in the case of wills that it is in the case of deeds."

To the same effect see—

Schouler on Wills, Sec. 241; and
Cassody on Wills (1893), Sec. 310.

Gillet on Indirect and Collateral Evidence (1897,) in treating this subject says (Section 281):

"Declarations of Testator.—In cases where the courts are called on to gauge the mental capacity of a testator, not only are his contemporaneous declarations evidence, but his prior and subsequent declarations are also admissible. There is a special reason why prior declarations are competent in such cases; this results from the fact that where chronic insanity is once shown to exist, its continuance is presumed. If a declaration throws any light upon the question as to a testator's mental condition, it is not to be rejected merely because in form the statement may be incompetent, for it can be disregarded as substantive evidence of the facts stated, and only regarded for the purpose which makes it admissible. The investigation of an issue of fraud or undue influence often requires an inquiry into the strength of the mind of the testator, and for that purpose evidence may be introduced in such cases of his declarations, but such statements, unless comprehended within the *res gestæ* of the execution of the will, are incompetent, as statements of substantive facts, to prove fraud or undue influence. The imperfectly reported case of Nelson *vs.* Oldfield (2 Vern. 76) would seem to be an authority in opposition to the last proposition, but the cases in this country are practically a unit in holding to the doctrine laid down above. A testator can not, of course, abrogate the statute and revoke his will by mere declarations, but such evidence is competent if it is a part of the *res gestæ* of the overt act of revocation. Statements by testators are often sought to be introduced as admissions, upon the theory that while yet in life their

declarations affect no vested interests but their own. It is entirely settled, however, as the testator is not a party to a contest concerning his will, that no statement of his can be introduced on the ground that it is an admission. Such statements are not in the nature of declarations in disparagement of title, but they are to be likened to the declarations of a grantor, after grant, in limitation of his grant, and are strictly hearsay. Moreover, public policy demands that the exercise of the important privilege of directing the transmission of property after death, hedged about, as it is, by rigorous statutory provisions designed to prevent imposition, should not, when the testator can no longer speak, be rendered nugatory by means of parol evidence. Even declarations which are strictly contemporaneous with the execution of the instrument are discarded where the purpose of their introduction is to contradict the instrument because 'a will must be understood to contain the testator's whole mind and intention on the subject-matters of the devise.' (2 Phil. on Ev., 1849 Ed., 350.) 'This exclusion,' says Mr. Redfield in his work on Wills (*p. 539), 'rests upon the general principle declared in all the reports, from Cheney's Case to the present day, that no parol evidence can be received to contradict, explain, supply, enlarge or qualify the words of a will, nor to explain the intention of a testator, except in the instance of a latent ambiguity, arising *de hors* the instrument, either as to the subject or the object of a bequest, and to rebut a resulting trust.' Many instances are afforded by the cases of declarations by testators which have been held competent, but, aside from statements accompanying equivocal acts, the character of which is drawn in question, it will be found that in each instance the declaration owes its competency to the fact that it sheds light on the testator's mental condition, or aids in the designation of the subject or object of the devise, or is suppletory of the will, or rebuts an equity, or tends to countervail the effect of evidence of the latter character."

This general rule, then, as well and concisely summarized

by Thompson, J., in Jones *vs.* Roberts, 37 Mo. App. 163–181 (1889)—

> "briefly is, that such declarations are admissible, not as evidence of the *facts* therein declared, but merely as evidence of the *state of feeling* of the testator at the time, and *then only* in cases where *that* is material."

This Evidence has been Uniformly Excluded by the Courts upon an Issue of Forgery in all Considered Cases of Authority.

As is shown elsewhere in this brief, the purpose for which the paper was executed, if in fact it was executed as it purports to be, is not open to examination in this proceeding (*supra*, pp. 27–30), therefore the sole question presented by this issue is, did or did not Joseph Holt write this paper; if he did, the answer must have been "Yes;" if he did not, it must have been "No."

In considering the question of the admissibility of this evidence then, the point to be looked to is, has the state of the testator's feelings any materiality to the issue, or in other words, does a knowledge of the state of the testator's feelings toward persons named and not named in the will tend to prove or disprove the physical fact to be determined in this case, namely, the writing or not writing by Joseph Holt of the paper in controversy.

While there are numerous cases in the books where wills have been contested on an issue of forgery, there are comparatively few in which the question was raised and decided as to what evidence was admissible on that issue.

It has been the earnest effort of counsel for plaintiffs in error to discover and place before this court, without reference to the nature of the decision, every case in which the question of the admissibility of evidence upon the issue of forgery of a will has been raised and decided, and it is believed that in the following pages will be found every reported decision on the subject.

From a consideration of these cases, counsel submit it will

be found that not only is the great weight of authority against the admissibility of such evidence, but that the case of Hoppe *vs.* Byers, 60 Md. 381, upon which the court below based its decision on this branch of the case, stands solitary and alone as the only judgment of an appellate tribunal holding such evidence admissible.

The leading case on this subject is that of Boylan *vs.* Meeker, 28 N. J. Law (4 Dutch.), 274–478 (1860). This case came up on a motion for a new trial before the Supreme Court of New Jersey, Green, C. J., and Whelpley, Vredenburg and Van Dyke, JJ., sitting, such eminent counsel as the late Joseph P. Bradley, afterwards a distinguished member of this court, and A. O. Zabriskie arguing against the rulings of the court below admitting such evidence as it is contended should have been excluded in the case at bar, and Cortlandt Parker and A. Whitehead in support of the rulings below. The case was submitted in 1859, and the court, at its February Term, 1860, after careful and deliberate consideration, unanimously held the admission of the evidence to be error, and ordered a new trial. Three of the judges delivered opinions, the care bestowed upon the case and the importance given it being apparent from the fullness of these opinions, covering over two hundred pages of the report.

As further indicating the importance of the matters in litigation in this case, and the energy and persistence with which it was contested, it seems proper to call the attention of the court to the history of the litigation as set out in a note appended to this decision (4 Dutch. 477), and to places in the reports where different phases thereof are reported. This case, under the same style, is found in 2 McCarter (15 N. J. Eq.) 310-358 (Feb., 1854), on appeal to the Prerogative Court from a judgment of the Orphans' Court denying probate to the will. Potts, J., who was called in by the ordinary to hear the appeal, affirmed the judgment of the lower court in an elaborate and careful opinion of forty-eight

pages, and his judgment, from which no appeal was taken conclusively established the invalidity of the will, as to personalty. In October, 1855, under the style of Turner *vs.* Hand, 3 Wall. Jr. 88, this litigation came before Mr. Justice Grier and a jury in the U. S. Circuit Court, in the form of an ejectment suit, resulting in a verdict sustaining the will. In the same volume (p. 258), under the style of *Ex parte* Turner, is reported a motion to the U. S. Circuit Court at its October term, 1858, for a mandamus to remove an ejectment suit from the New Jersey courts to that court, which motion was refused. Subsequently, in November of the same year, upon a motion for a new trial, a question of practice was presented to the Supreme Court of New Jersey, Meeker *vs.* Boylan, 3 Dutch., (27 N. J. Law), 262, and eventually, in 1860, the motion was heard on the merits and the verdict was set aside, and a new trial granted as above recited.

From the above it will be seen that the Probate Court and, on appeal, the Prerogative Court, found against the will; that an ejectment in the U. S. Circuit Court resulted in a verdict in favor of the will; and that in another action of ejectment in the New Jersey courts, resulting in a verdict against the will, the verdict was set aside and a new trial granted.*

The importance of the interests involved, the care and labor bestowed upon the case by the court, the eminence of the judges and the ability and learning of the counsel who conducted the proceedings, bespeak for the judgment and opinions of the court, it is submitted, even more than the usual consideration paid to the utterances of that deservedly respected tribunal.

The action was ejectment, and at the trial the will of Meeker was contested by the plaintiffs upon three grounds, as shown in the opinion of Whelpley, J. (p. 276), namely:

"1. Incapacity. 2. *Forgery of the will.* 3. Fraud

* Counsel are informed that after this decision (reported in 4 Dutch.) the case was compromised and the litigation thus terminated.

practiced on Meeker by inducing him to sign a paper without knowing it was a will."

Further on the learned justice, in discussing the questions presented in the court below, says (pp. 278–9):

"It is manifest, from the state of the case and the course of the argument in this court upon this rule, that the plaintiffs relied upon the declarations and conduct of Meeker, both before and after the day of execution, to show that while living he never knew of the existence of such a will, and that therefore he had never knowingly executed the paper.

"Upon the issue as to his sanity when he executed the paper, his conduct and declarations, both before and after that time *tending to show his want of capacity at the time*, were competent evidence for the plaintiffs. All the authorities support that position.

"But the case clearly shows that these declarations were offered, received, and pressed upon the jury as the proper foundation of a verdict against the will, on the broad ground, that even if the testator had testamentary capacity, yet that he never executed the paper as a will because these declarations showed his utter ignorance of any such paper, and were, if true, inconsistent with the idea of its execution by him."

. . . . . .

(Pp. 289–90.) "The rule is admitted by all that the declaration of the grantor of a deed in disparagement of his title, if made before he departs [*sic*] with it, are admissible against his grantee, but those made afterwards are not admissible.

"Why not receive the declarations made afterward by the grantor of a deed to show fraud or forgery, that the deed never had a legal existence as against the grantor? Suppose a father puts his son in possession of property in his lifetime, and after his death the son produces a deed for the same, duly executed and purporting to be duly acknowledged, and forgery of the deed is set up by the other heirs at law, an ejectment is brought by them against the son. He proves the deed in due form of law.

> Would the declarations of the father, made after the date of the deed, that the same was a forgery, or had been obtained by duress, be competent evidence for the heirs at law? All the cases say not, because they were made after the date of the deed. But do not the declarations prove there was no deed; and if there was none they were in time, for no title had passed? If the declarations are competent at all, they are so to prove there never was any deed. They overthrow the date, the presumed or proved time of execution, as well as the other part of the deed. The truth is, the law excludes the declaration of the grantor of a deed or maker of a will, whether made before or after the time of alleged execution, when that execution has been once proved in the mode required by law, when offered to show fraud, duress, or forgery, but admits the declarations made at the time as a part of the *res gestæ* upon this plain principle, that they are hearsay, not under sanction of an oath, not in disparagement of the right of the declarant, and therefore not against his interest. To admit them would be a departure from principle, an abrogation in fact of the statute of wills, and in the last degree mischievous and destructive of the right of testamentary disposition."

And Van Dyke, J., makes the following observations in the course of his opinion (pp. 303–5):

> "The first exception taken at the trial was to the verbal declarations of the deceased, offered not to show an insane or unsound mind on his part, but showing a sound one, and made at various times through a course of years, and to divers persons, to prove that it had long been his intention to make a different will, in some respects, from the one in question, and consequently that he could never have executed this one. There were other of his declarations offered going to different points, but all offered to show that it was very unlikely and improbable that he ever signed this will. The declarations were often isolated, far apart, and formed no part of what could be termed the *res gestæ*. It was very proper for the plain-

tiffs to show, if they could, that it was unlikely and improbable that the deceased should have signed such a will, but could they do it by such declarations? Can a will, duly and solemnly made, and abundantly proved, be overthrown by proof of such declarations? Can every party who, in good faith or in bad faith, sees fit to make the charge of fraud or forgery against a will, surrounded, it may be, with all the form and substance and sanctity known to the law, be permitted to assail it, and destroy it by calling witnesses, either few or many, to show that, according to the declaration of the testator, it had been his intention to make a very different disposition of his property, and to leave a legacy to some one which is not found in the will? What will could be safe under such a rule?

"For if the evidence can be received at all, it is because it is of a character and kind which may be allowed to prevail over a will, no matter how well it is proved. If a jury may hear it they may believe it, and act upon it, and give it preference over everything else; and all a party has to do who dislikes a will, and which may in fact be unpopular because it disappoints a whole community, is to raise the charge of fraud or forgery against it, call the dissatisfied community as witnesses to prove the promises made them by the testator in his lifetime, and which were quite different from the provisions of the will, accumulate such declarations of a talkative testator until the jury shall think they ought to prevail over the witnesses who saw the will executed, and the best prepared and best executed will in the world is a perfect nullity. One thing more may perhaps be necessary, and that is to ask the court to declare and determine that it is the exclusive province of the jury to pass upon the facts in the case, and they having done so, the court cannot interfere with their verdict. Nor does the rule derive any aid from the large number of witnesses that have testified on that subject in the present case, for if a jury can lawfully be governed by the testimony of a hundred witnesses, they may also be by that of fifty, by that of ten, or

five, or one. There is no fact that can be established by a hundred witnesses that cannot be lawfully established by one witness, unless it may be some special exception requiring more.

"It is easy to see with what danger this rule is accompanied. A man makes his will according to all the forms of law; both the subscribing witnesses have died, and no direct proof can be brought to bear on the fact of the execution. The testator, being unable to write, has made his cross. Some heir at law raises the charge of fraud or forgery against the will. No one knows anything about the affair, and to prove the signatures of the subscribing witnesses is all that remains to be done. This is accomplished quite satisfactorily, but the jury hesitates in face of so grave a charge, and then the opponent of the will finds one, two, three, or a dozen persons, who testify that they heard the testator say at different times, that he did not like the principal legatee, or that he intended to give some portion of his estate to some one else; and as no such legacy or devise appears in the will, and as such evidence is perfectly lawful and seems overwhelming, and as the jury are told by the judge that they are at liberty to believe it and act upon it, they hesitate no longer. The weight of the testimony seems to them to be against the will, and they determine to annul it. The court, on review, holds the evidence to have been competent, and as the jury have passed upon it, their verdict does not seem to be so much against the weight of evidence as to justify an interference. Here the will is destroyed simply by the admission of declarations of the testator, which may have all been correctly detailed, and yet the will be perfectly good and have been duly executed by the testator, and the same result *might* be effected in any and every case by the same means, even when all the witnesses were living and testified to the due execution of the will. There seems in fact to be no end to the mischief that might be done by the establishment of such a rule."

And again, at pages 306, 307, he says:

> "Few things are more easy than to make a false or forged bond against a deceased person and raise it against his estate, but if a subscribing witness were to swear that he actually saw the deceased obligor sign, seal, and deliver the bond, and that he subscribed the same as a witness at the time, how many declarations of the deceased obligor, made in his lifetime, that he owed nobody anything; that he had never given a bond in his life, and that there was no debt or claim whatever, that could be presented against his estate after his decease? How many such, I ask, or similar declarations, could be received in evidence to overcome the bond thus proved, even though it should then be held and prosecuted by one of his children? Not any, beyond all doubt. And why not, says the party resisting the suit on the bond; for, says he, we not only charge that this bond is forged, but we charge also that the subscribing witness is one of the conspirators in the fraud, and therefore we claim under the peculiar circumstances of the case, to lay before the jury such declarations of the deceased obligor himself, being the ancestor of the plaintiff, as must show conclusively that he never could have executed such a bond. The answer of the law would certainly be that no such declarations could be received, simply because they were incompetent and unlawful, and there was nothing in the nature of the case to justify the admission of unlawful evidence."

He then concludes his opinion on this branch of the case in the following words (pp. 307–8):

> "I think, therefore, upon principle, upon reason, upon safety and expediency, and on the express demands of the statute, that the declarations excepted to in the case should have been refused at that trial.
>
> "I think, too, *that the current of decisions, almost unbroken in this country and in England, has settled the law that such declarations are inadmissible.*"

While the above cited decision was rendered by the

Supreme Court of New Jersey, and not by the Court of Errors and Appeals, yet it is the judgment of the highest court of that State to which the case on that proceeding could have been carried. A writ of error from the Court of Errors and Appeals did not lie to the Supreme Court to review its judgment in granting a new trial; so that the only way in which the case could have been brought to that court would have been on writ of error after a new trial had been held. As already pointed out, however, the case was settled after the decision reported in 4 Dutcher, and that judgment, therefore, stands as final and controlling in that State upon the questions decided until overruled by the Court of Errors and Appeals. This decision of the Supreme Court has, however, never been overruled. On the contrary, the Court of Errors and Appeals has expressly approved the doctrine of Boylan *vs.* Meeker, in Rusling *vs.* Rusling, 36 N. J. Eq. 603 (1883), where Dixon, J., speaking of the admissibility of the declarations of a testator on the issue of undue influence, says (p. 609):

> "There is no legal principle upon which they can be treated as evidence of acts constituting undue influence.
>
> "The weight of authority touching this matter is in accordance with true principle; but it is not necessary here to review the cases. In Boylan ads. Meeker, 4 Dutch. 274, Whelpley, J., refers to many of them, examining the point with much care; and more recently in Shailer *vs.* Bumstead, 99 Mass. 112, Colt, J., has discussed the subject with great clearness of discrimination, the conclusion in both opinions being that at which we have arrived."

From the judgment of the Prerogative Court reported in 2 McCarter an appeal lay to the Court of Errors and Appeals, but none was taken, and that judgment therefore was final as to the personal estate.

The rulings of Judge Potts in that case have not, however, been followed in any court. On the contrary, in a recent

case involving the identical issue presented in the Meeker will case (forgery) the Prerogative Court followed the rulings of the Supreme Court in 4 Dutcher, declaring that decision to be a correct statement of "the law in this State at this day" (1892).

Gordon's Case, 50 N. J. Eq. 397, (1892) in which the probate of the will was resisted on two grounds: First, that the testator was not domiciled in New Jersey, and second, that it was a forgery (p. 399). The Ordinary, (Chancelor McGill,) sitting as judge both of the law and the facts, in his opinion, after carefully reviewing all the evidence says, (p. 424):

> "Before concluding I should call attention to a class of evidence much relied upon, the admissibility of which is disputed. I refer to declarations of Mr. Gordon, which make for and against the authenticity of the disputed paper as his will. I received this evidence under objection, that I might in the determination of the case pass upon its admissibility and use or reject it, according to my conclusion. It is noticed that the question upon which the declarations bear is not as to fraud exercised upon the testator to secure the execution of the will, but as to the fact whether the testator ever executed the instrument. This question was presented in the case of Boylan *vs.* Meeker, 2 McCart. 310, first in this court in 1854, where Mr. Justice Potts of the Supreme Court, sitting for the ordinary, held that such declarations were admissible, and several years later, 1860, in the Supreme Court (4 Dutch. 274), where, after exhaustive considerations of the precedents, it was held that such declarations were not admissible either to support or overthrow a will. The latter decision I understand to state the law in this State at this day. The declarations of a testator, when not offered to show his existing mental capacity, are regarded as mere heresay, and are not admissible, unless they come within a recognized exception to the rule which excludes that kind of evidence. The exceptions to the rule have been enumerated by Mr. Justice

Dixon in Rusling *vs.* Rusling, 9 Stew. Eq. 603, 608, where the principle underlying the question considered is discussed in the Court of Errors and Appeals; and Boylan *vs.* Meeker is cited with approval. So in other cases the same principle is applied. Lynch *vs.* Clements, 9 C. E. Gr. 431; Kitchell *vs.* Beach, 8 Stew. Eq. 446; Pemberton's Case, 13 Stew. Eq. 528; Middleditch *vs.* Williams, 18 Stew. Eq. 726.

"I am unable to distinguish in principle between the question here presented and that which was considered in Boylan *vs.* Meeker, and I, therefore, decide against the admissibility of the declarations upon either side."

Counsel for the caveators in the court below ingeniously endeavored to show that the separate opinions of the judges in this case, while each leading to the same judgment, did not concur in their rulings on the question of the admissibility of the evidence of declarations, and that the chief justice must be considered to have concurred only in the opinion of Judge Vredenburg.

It is submitted that such a contention is without reasonable foundation, as will readily appear upon considering what the court had before it for decision, and did actually decide.

In the trial of the ejectment forgery, fraud, and mental incapacity were set up. The motion for a new trial, which the Supreme Court had before it, was based upon two grounds, error in law in admitting the evidence upon the question of forgery, and that the verdict was against the weight of the evidence. The Supreme Court sustained the motion for a new trial upon *both grounds.*

Much, if not all, of the evidence was admissible upon the claim of mental incapacity, and in deciding that the verdict, which was general, was against the weight of the evidence, it was necessary that all the evidence admissible upon any ground should be considered. It is to this branch of the motion alone that Judge Vredenburg addresses himself in his opinion, and in that opinion he does not discuss the

question of the admissibility of any of the evidence. Had he dissented from the view of his brethren on the bench on the question of law, it is incredible that he would not have expressly so stated in a case of that importance, which was remanded for retrial, and had the chief justice concurred in such a dissent, the question of law as to the admissibility of the evidence raised by the motion could not have been sustained as the court would have been equally divided.

This view of the decision is made clear beyond question by reference to the following observations of the three judges in the course of their opinions:

Whelpley, J. (p. 279):

> "Upon the issue as to his sanity when he executed the paper, his conduct and declarations, both before and after that time *tending to show his want of capacity at the time* were competent evidence for the plaintiffs. All the authorities support that position."

Vredenburg, J. (p. 331):

> "The defendants now seek to set aside this verdict, *among other grounds*, because it is, as they allege, *against the clear weight of evidence.*"
>
> (P. 332.) "We are inquiring as to the clear weight of the evidence upon the question, whether on the evening of the 12th of January, 1852, the testator executed the paper of that date as his will."

Van Dyke, J. (p. 303):

> "The matter in controversy, as presented here, involves grave *questions of law, as well as of fact.* These in order, or so many of them as I deem important to a decision of this case, I will proceed to examine."
>
> (P. 319.) "It is also objected to this verdict, that it is *against the weight of evidence in the case.* If it be against the clear weight of the evidence it should be set aside.
>
> . . . . . .

> "If the declarations of Hoyt and the testator were stricken out, it would take from the opposition to the will much of its force; but in the view I shall *now* take of the case, *I shall consider all the evidence as having been properly received, and shall confine my examination to its force and effect.*"

Van Dyke, J. (p. 330.)

> "I am in favor of setting aside the verdict, as contrary to the clear weight of the evidence. There are a few legal points raised in the case which I have not deemed it necessary to discuss, but I *concur entirely* in the opinion, as expressed by Judge Whelpley, on these points."

As all the judges concurred in the judgment granting a new trial upon both grounds stated in the motion, it was to be expected that both Judges Whelpley and Van Dyke would comment to some extent, as they both do, upon the evidence, which was admittedly competent for some purposes, and which it was their duty to consider on the question whether the verdict was against the weight of the evidence.

That they did so was entirely proper, and does not, in the slightest degree, support an inference that their opinions are not consistent in considering evidence which was held to be inadmissible upon the question of forgery.

In fact, it is submitted, a perusal of the opinions of Whelpley and Van Dyke, JJ., will demonstrate that the reasoning of both as well as the conclusion reached is identical, though stated in different language; and that Vredenburg, J., who addresses himself exclusively to the question of the weight of the evidence, in all he says, is in entire harmony with the expressions of Whelpley and Van Dyke, JJ., on the same part of the motion.

It is to be observed that no such captious view of this decision is taken by the courts of New Jersey. On the contrary the courts of that State hold this case to be authority

on the question now under discussion, and to state the law correctly.

Rusling *vs.* Rusling, 36 N. J. Eq. 603.
Gordon's Case, 50 N. J. Eq. 397.

This question was presented to the Supreme Court of New York in Johnson *vs.* Hicks, 1 Lansing (N. Y.) 150 (1869), where the issues were:

> "1st. Did Mason Hicks, in his lifetime, subscribe his name to said instrument?
> "2d. Did he, in the presence of Philip Young and A. T. Richardson, subscribe the same?
> "3d. Did each of the attesting witnesses sign his name as a witness at the end of said instrument at the request of said Mason Hicks?" (pp. 151–2).

The case was tried before Marvin, Lamont, and Barker, JJ., the latter delivering the unanimous opinion of the court, saying (p. 158):

> "Upon the trial the appellants offered to prove the declarations of Mason Hicks, before the time of making the alleged will, that he intended to give his property to the legatees therein named, and that after the date of the will he declared that he had made such a will, and stated who the witnesses were, and that the will was in the upper town of Lockport. This evidence was objected to and excluded by the court, and the appellants excepted. This is clearly and admittedly hearsay testimony, and was properly rejected unless it falls within some of the exceptions to the general rule of law that excludes such evidence. Both parties claim under the decree, and by representation, and they take his estate subject to all claims, demands, and incumbrances thereon. As between ancestor and heir, devisor and devisee, testator and legatee, donor and donee, the declarations of the former made in regard to his estate against his interest, and in limitation or qualification of the same, are evidence against the latter, on the ground that they are privies in estate and identified in interest, and by this rule

> it is to be determined whether the evidence should have been received or not. (1 Greenl. Ev., Secs. 189, 190.) It was not against his interest to make the declaration, and it certainly in no wise affected his estate favorably or unfavorably. It remained the same, whether he had made the will or not. If he had executed the will when he made the alleged declaration, it vested no estate in the devisees and legatees named therein, and was subject to his revocation."
>
> . . . . . .
>
> (P. 159): "The statute of this State requires wills to be excuted with great solemnity and formality, and in full compliance with its provisions, and the declarations of the testator cannot be given to uphold or destroy their validity unless made at the time of the execution so as to become part of the *res gestæ*. Jackson *vs.* Betts, 6 Cow. 377. We are therefore of the opinion that the offer was properly excluded."

In Hayes *vs.* West, 37 Ind. 21 (1871), the issues were signature, mental capacity and undue influence.

Declarations of the testator to the effect that he was entirely satisfied with the laws of descent and distribution and did not intend to make a will were offered and admitted in evidence.

The defendants asked the court to charge the jury as follows:

> "The declarations or statements of a testator made at any other time than at the time when he is engaged in the execution of the instrument claimed to be his will, cannot be considered by the jury in determining the question of the execution of the will, but such declarations or statements were permitted to go to the jury for the purpose of enabling them to determine his mental capacity, and not for the purpose of proving or disproving its execution" (p. 24).

The Supreme Court after reviewing the instructions and

discussing the law and approving the doctrine as laid down by Redfield (p. 546), conclude:

> "We are of opinion that the charge asked should have been given" (pp. 25–6).

In the somewhat celebrated case involving the validity of the alleged will of the late Senator Joseph E. McDonald, McDonald *vs.* McDonald, 142 Ind. 55 (1895), the Supreme Court of Indiana affirms the same doctrine.

In that case one of the issues was that the signatures of McDonald and of the witnesses were forgeries (p. 59).

It was contended that McDonald had executed a will which had been lost or spoliated and that the one offered in this case was spurious. Declarations of Senator McDonald to John M. Butler as to the contents of his will were offered in evidence (pp. 80, 81) to prove the contents of the alleged lost will. Objection was made and exception taken to the ruling admitting this evidence. In dealing with this objection Jordan, J., for the court, says (p. 81):

> "The contention of the learned counsel for appellants is that these declarations went to the jury for all purposes, and upon all the issues in the case, without limitation. It is settled in this State that the declarations of a testator, made at a time other than when the will was executed, are not admissible in an action of contest upon the issue of fraud or undue influence. Runkle *vs.* Gates, 11 Ind. 95; Hayes *vs.* West, 37 Ind. 21.
>
> "But it is evident, we think, from the instructions of the court to the jury, that the declarations were admitted in evidence, and the jury permitted to consider them for the purpose only of showing the contents of the alleged lost or destroyed will, and whether, if such a will ever existed, it remained unrevoked at the death of the testator."

The court below in its instructions to the jury with reference to these declarations had said (instruction No. 8)—

> "if you find that such declarations were made, you

> will only consider them for the purpose of determining the character and contents of such alleged lost or destroyed will, and whether, if it ever existed, it remained unrevoked at the time of the death of the testator, no inference in support of the other issues and charges in this case can be drawn by you from these alleged declarations" (p. 85).

The appellants requested the court to add to this instruction the proposition (instruction No. 10)—

> "that such declarations or statements of Senator McDonald cannot be considered by the jury in determining the question of the genuineness of the will in contest" (p. 85)—

which was refused. In considering the error assigned arising out of the refusal of this tenth instruction the Supreme Court says (p. 86):

> "It is contended by appellants that instruction No. 8 given by the court was not sufficiently clear and explicit in limiting the jurors in the consideration of the declarations in question, and that, hence, No. 10, as requested, should have been given. It is well settled by repeated decisions of this court that it is not error for the trial court to refuse an instruction requested, although accurately stating the law, if the same proposition is substantially given in another instruction."

The court then states the substance of the eighth instruction, and says (pp. 86, 87):

> "Not content with this, the court proceeded further and impressed upon the jury the fact that they were prohibited from drawing from this evidence any inference in support of the other issues and charges in the case.
>
> . . . . . .
>
> "We are of the opinion that the court embodied in its instruction all that was substantially necessary for the information of the jury as to the manner in which they were to apply and consider these declara-

> tions. We can not presume that intelligent jurors, where evidence has been admitted for a certain purpose, will consider it upon other issues, or for other purposes, when the court has expressly stated to them that they must not do so. It must be presumed that the jury obeyed the court's injunction."

In Kennedy *vs.* Upshaw, 64 Texas, 411 (1885), the issue was whether or no the codicil to the will in question had been forged. The will was dated February 8, 1883, the codicil March 15, 1883, and the testator died March 28, 1883.

Proponents offered to prove that on the 18th of March, 1883 (three days after the date of the codicil in question), the testator said in reply to certain questions (p. 416):

> "No; I have not made any change in my will, or in the disposition of my property, and I am not going to, and am surprised that you ask me such a question."

Proof of this declaration was admitted over objection.

Stayton, J., held such evidence to have been inadmissible, saying (p. 417):

> "The declarations of the testator were made subsequently to the date of the codicil, and there is no fact connected with them which can make them *res gestæ*.
>
> "There was no question as to the mental condition of the testator at the time it is claimed the codicil was executed; the sole issue was as to the forgery or no of the codicil.
>
> "The true rule as to declarations of a testator made before or after the execution of a testamentary paper, when such an issue is presented, we believe to be, that summarized by Mr. Redfield from the case of Boylan *vs.* Meeker."

The court then quotes 1 Redf., Wills, pp. 557–9, and after

referring to the laws governing the revocation of wills, says (p. 418):

> "The object of these laws is to prevent fraud and perjury, and the experience of ages bears evidence of their wisdom and of the necessity for their enforcement to avoid the evils which they are enacted to prevent."

In Walton *vs.* Kendrick, 122 Mo. 504 (1894), the will was contested as stated by the court (p. 509) on the ground that it—

> "was not written or signed by the said John W. Price, and was not signed by any other person for him, by his direction, in his presence, as provided by law; and that the said paper writing, by reason of the matter aforesaid, is not the will of John W. Price."

The will purported to bear the signature of the testator and was attested by four witnesses, all of whom testified to the testator's request that they attest the will as witnesses, and his acknowledgment at the time that it was his will. Only two of them said that at the time of so attesting, his name was appended to the paper. From the report of the case it would appear that the signature was not his own, but that his name was signed to the paper by his daughter. The will purports to have been made in 1886.

The deposition of a Mrs. Kendrick was read in the case, in which she testified, among other things, that about the year 1886 she had a conversation with the testator; that the testator told her that he had made his will; that he had not signed it, but that he had told his daughter Katie to sign it for him, and had seen her do it. Under the law of Missouri the signature by another in the presence of the testator by his direction would have been a valid execution.

The case was heard first in the Supreme Court before Division One and subsequently in banc before the whole court.

The majority of the court held that the evidence of the

attesting witnesses as to the execution, if believed by the jury, was sufficient proof of execution under the statute, MacFarlane, Justice, alone dissenting on this point (p. 530).

The contestants offered no evidence at all, yet the Court of Appeals reversed the judgment in favor of the will and awarded a new trial solely because of the admission in evidence, over objection of the contestants, of the alleged declarations of the testator made to Mrs. Kendrick, and, in so doing, adopted the opinion of MacFarlane, Justice, rendered in the case at the hearing before Division One of the Supreme Court, which opinion is as follows (p. 518):

> "Since the decision of Gibson *vs.* Gibson, 24 Mo. 234, it has been the settled law in this State that declarations of the testator made subsequent to the execution and publication of the will are not admissible as evidence of the facts stated. In his able and exhaustive opinion in that case Judge Leonard sums up the law in reference to such declarations as follows: 'The just result of the whole matter, we think, is that these declarations, so far as they are relied upon to furnish evidence of the facts they contain, are mere hearsay, and that there is no ground, either of authority or reason, to exempt them from the rule of law excluding all such testimony. We repeat, however, what we have before remarked, that, as mere verbal facts, external manifestations of what is passing within, they are always evidence of the testator's intellect and affections for the time being, provided they are of such a character, either by themselves or in conjunction with other evidence, and are so connected with the making of the will in point of time as to furnish any reasonable ground of judgment in reference to the testator's mental condition at that time.' This opinion is so conclusive and satisfactory that it has been adopted and followed in this State without question or comment wherever the question has been raised. Tingley *vs.* Cowgill, 48 Mo., on p. 298; Rule *vs.* Maupin, 84 Mo. 589; Bush *vs.* Bush, 87 Mo. 485; Spoonemore *vs.* Cables, 66 Mo. 587. In the case last cited Judge Napton contents himself by

> saying: 'We have nothing to add to what was there said.' Schouler, in his work on Wills, disposes of the subject in one brief section, as follows: 'The declarations of a testator before or after making a will are inadmissible on the issue of its execution.' Section 317*a*. To the same effect see Jones *vs.* McClellan, 76 Me. 49; Kennedy *vs.* Upshaw, 64 Tex. 411; Runkle *vs.* Gates, 11 Ind. 95; Davis *vs.* Davis, 123 Mass. 590; Kitchell *vs.* Beach, 35 N. J. Eq. 446; Herster *vs.* Herster, 122 Pa. St. 239; Caeman *vs.* Van Harke, 33 Kan. 333; Johnson *vs.* Hicks, I Lans. (N. Y.) 150; Couch *vs.* Eastman, 27 W. Va. 796. In the case last cited the court, after exhaustive review of the authorities, says: 'We have not found a single case that warrants the introduction of such evidence.' Under the law, thus well settled, we can but conclude that the declarations of John W. Price, as testified to by Mrs. Kendrick, bearing upon the execution of the will, were inadmissible."

In the case of Leslie *vs.* McMurtry, 60 Ark. 301, (1895), the question was whether the will in controversy was or was not forged.

Riddick, J., delivering the opinion of the court, says (p. 302):

> "There is only one question of law that is presented here for our determination. The appellants claim that the Circuit Court erred in refusing to allow them to prove the declarations of Hunt made about a year after the date of the instrument claimed to be his will and to the effect that he had made no will. They contend that this was competent evidence tending to support their contention that the will in question had been forged. The weight of authority on this point seems to be decidedly against this contention."

He then quotes from 1 Redf. on Wills, p. 557, and cites Schouler on Wills, Sec. 241, and continues (p. 303):

> "The reason for rejecting such declarations, when not part of the *res gestæ*, is that such declarations are

not against the interests of the testator; he is under no obligations to speak the truth and they are only hearsay evidence. It is pointed out also that the statute, having required certain solemnities by which wills may be revoked, it would be unreasonable to allow them to be defeated or disproved by the careless utterances of the testator. The question was discussed at great length in the leading case of Boylan *vs.* Meeker."

He then quotes from page 283 of that case and concludes in these words:

> "For these reasons we think the Circuit Court did not err in rejecting proof of the declarations of Richard Hunt to the effect that he had made no will."

The most recent case on this point is Swope *vs.* Donnelly, 190 Pa. St. 417 (1899), where the only issue was whether or not the will in controversy was forged. At the trial it appeared that Mrs. Donnelly, the testatrix, had died December 25, 1893. The paper propounded as her will was dated December 10 of the same year and left testatrix's property to her sister and neices, to the exclusion of her husband, who was attacked by the will. Witnesses testified to the execution of the paper, and plaintiffs, in support of the paper, introduced evidence of declarations of the testatrix, previous to the date of the will, to the effect that she wished her property to go to her own people, and did not wish her husband to have any of it; that she had left her sister well provided for, and that she had executed a will and had it with her at the time of making the declaration testified to.

A verdict was rendered for the plaintiffs in favor of the will, and a motion for a new trial having been denied (21 Pa. Co. Ct. Rep. 167 [June, 1898]), judgment was rendered on the verdict.

Fell, J., delivering the opinion of the Supreme Court reversing the judgment below, says (p. 420):

> "On the questions of testamentary capacity and fraud or undue influence in the procurement of a will, the declarations of a testator, not a part of the *res gestae*, but so connected in point of time with the testamentary act as to justify an inference that they indicate the state of the testator's mind when the will was executed, are admissible in evidence. Such declarations may be direct proof on the question of testamentary capacity, but as tending to establish the fact of undue influence they are heresay merely, and without force. . . . The proposition that the declarations of a testator as to his intentions are admissible where the will is disputed on the ground of fraud, circumvention, or forgery, has received the general assent of text-writers on the subject; but the cases in which such declarations have been admitted, where the only question was that of forgery, are few. The trend of decision seems to be very decidedly in favor of their admission in corroboration of direct proof of the execution of the will, whether made before or after its date."

He then cites Turner *vs.* Hand, 3 Wall. Jr. 88; Tynan *vs.* Pascal, 27 Tex., 286; Johnson *vs.* Brown, 51 Tex. 65; Hoppe *vs.* Byers, 60 Md. 381, and Taylor Will Case, 10 Abb. Pr., N. S., 300 and continuing, says (p. 421):

> "In all of these cases it was said in effect that the proof of declarations was not in itself sufficient either to establish the execution of the will or to overcome the testimony of the subscribing witnesses and that it was admissible only for the purpose of corroboration. . . . At the best this is a dangerous class of testimony and its admission should be carefully guarded and its effect as corroborative only should be clearly defined."

After reviewing the evidence, he continues (p. 422):

> "There was not the slightest limit as to the time when the declarations were made and under general offers the witnesses were allowed to testify to conversations had at any time during the life of the de-

ceased. This led to the introduction of testimony which was clearly irrelevant."

After noticing the declarations testified to as indicated above, he says (p. 422):

> "The writing in question, if genuine, was prepared by the deceased in the house of her sister about fifteen days before her death. The testimony of one of the witnesses tended to show that there was a prior will; that of the other an intention to make a will, and perhaps that of both a general intent that her husband should receive only such share of her estate as the law would give him. But upon the real issue, whether a will had been executed in December, 1893, this testimony threw a very uncertain light, and it was altogether too vague and remote to be considered as corroborative of the testimony of the witnesses to the execution of the writing offered as a will. The fact that a will with which the deceased was satisfied was in existence in October could not be corroborative of testimony that another will had been executed in December, and the mere expression of an intention to make a will five years before would have no weight whatever."

Thus, it is shown that in eight cases in the appellate courts of seven States, the question of the admissability of the declarations of the testator, not relating to the paper in controversy, upon an issue of forgery, has been presented and decided and in each the judgment, after careful consideration, has been unanimous against its admissibility.

In the charge to the jury in this case the court said (Rec., p. 128):

> "If this will had been found . . . among the papers of Joseph Holt, that circumstance would lend to the instrument a presumption of genuineness. . . . If any one of these subscribing witnesses—Gen. Grant, who was at the time of this alleged execution and of his alleged attestation President of the United States, or Gen. Sherman, who, I believe,

> was General of the Army at that time, or his wife—had appeared here, *I hardly think you would have any question as to the genuineness of the signature of Joseph Holt.* . . . If any other reputable person had been brought into this court who had been able to testify that he had, although not an attesting witness, seen Joseph Holt sign this paper, or that Joseph Holt had acknowledged his signature to him, *the question would have been almost absolutely foreclosed.*"

Yet no one or all of these circumstances would have unwritten any one of Judge Holt's letters admitted in evidence. No one or all of these circumstances would have unsaid any one of his alleged declarations nor undone any one of his alleged acts admitted in evidence.

Nay, more, General Grant, General Sherman and Mrs. Sherman might each have proved all the acts, declarations and letters in this Record and no one or all would have had the slightest tendency to contradict their evidence of the due execution of this paper.

This illustration serves to make manifest the utter irrelevancy and inadmissibility of the evidence. This Record will be searched in vain for an act or declaration of Judge Holt, which if true would have had the slightest tendency to contradict the testimony of a witness swearing that he saw Judge Holt sign this paper.

The Admissibility of this Evidence Supported Solely by the Decision in Hoppe vs. Beyers, 60 Md. 381 (1883.)

As stated above, every decision bearing upon the question of the admissibility of the declarations of a testator upon an issue of forgery of a will is believed to be presented in this brief. While the question has been decided with comparative infrequency, yet as above shown, in eight decisions, arising in seven States, the first in 1860, in New Jersey, and the last in 1899, in Pennsylvania, the evidence has been ruled to be inadmissible. Such a concurrence of authority in different

jurisdictions it is submitted, ought not to be ignored or even lightly regarded, but on the contrary should control the disposition of this case. Some decisions, apparently in conflict with the cases above cited, made in courts of first instance, are found in the books and will be considered later on. They are not regarded as authority, however, being decisions at the trial and not cases carefully heard and decided upon appeal. Of the cases heard on appeal, in which the question has been presented, but two, Johnson *vs.* Brown, 51 Texas, and Hoppe *vs.* Beyers, 60 Md., held the evidence admissible.

The decision in the first case was afterward overruled by the same court in Kenedy *vs.* Upshaw, 64 Texas, above cited, and is therefore no longer authority even in that State.

There thus remains but one case, that of Hoppe *vs.* Beyers, 60 Md., in which an appellate court has held these declarations admissible upon an issue of forgery.

As that decision stands alone, opposed by all the other decisons on the subject, that fact, it is submitted, might be sufficient to justify this court in declining to follow it, especially as none of the decisions rest upon any local law peculiar to the jurisdictions in which rendered, but all rest upon the general principles of evidence in common law trials by jury.

The justly high estimate which generally attaches to the opinions of the Court of Appeals of Maryland and the influence which its decisions have deservedly exercised, justify if not require, a careful analysis and an extended consideration of that decision in this brief.

The Decision in Hoppe vs. Beyers Is Unsupported by Authority.

The case arose upon a paper offered as the will of J. H. Hoppe. It purported to be a holograph paper, unattested, in the form of a letter to the beneficiary, who had been, up to the time of her marriage, an inmate of the testator's

house. It was dated in 1875, and the decedent died in 1881, at the age of eighty-one years.

The issue presented for trial is stated by the court thus (p. 382):

> "The single issue transmitted for trial in this case was whether a certain paper-writing propounded for probate on the 19th of September, 1881, by Eliza Ann Beyers, wife of John G. Beyers, as the will or testament of John Henry Hoppe, was written or signed by him, or signed by some other person in his presence or by his express direction?"

On the trial the caveatees gave evidence tending to prove that the paper was in the handwriting of the testator. The caveators introduced evidence to the effect that neither the paper nor the signature was in the testator's handwriting. The caveatees over objection and exception introduced evidence of declarations made by the testator before the date of the will to the effect that he was going to provide for the beneficiary therein named, and also evidence, over objection and exception, of declarations of the testator subsequent to the date of the will, that he had made provision for her. The jury found in favor of the will and the caveators took the case to the Court of Appeals upon their exceptions to the admission of that testimony.

While the court in its opinion indulges in a rather wide range of discussion, it will be observed that the only question presented by the record was, whether upon an issue of forgery, declarations of the testator were admissible in support of the will, to prove execution.

Miller, J., in delivering the opinion of the court, reviews the case of Griffith *vs.* Diffenderfer, *supra*, at length, holding that the doctrines of that case do not apply, and says (p. 390):

> "But the questions thus decided are not exactly the same as that now before us. In that case (as indeed in most instances where there have been

charges of fraud and undue influence) the genuineness of the instruments and of the decedent's signature thereto were admitted. The question whether, or to what extent such declarations are admissible upon a charge of *forgery* did not arise, and, in fact, we have found but very few cases in which such a question has arisen upon the single issue of *forgery vel non.* The only reported English case, brought to our notice by counsel, in which the question has been decided, is that of of Doe, *ex dem.* Ellis *vs.* Hardy, 1 Moo. & Rob. 525."

In commenting upon that case, the court says (p. 391):

"It is true this was simply a decision at a *Nisi Prius* trial, but, though made as long ago as 1836, it does not appear to have been overruled or questioned by any subsequent English authority. On the contrary, the very language of the judge has been cited and adopted by the most eminent English text-writers on evidence and wills. 2 Taylor on Ev., Sec. 1038; Roscoe's Nisi Prius Ev. (14th Ed.) 57 and 971; 1 Jarman on Wills (5th Amer. Ed. from 4th Eng. Ed.) 723. See also 1 Redfield on Wills (4th Ed.) 511, note 4.

"But apart from direct authority on the subject, if declarations of a deceased party are admissible in any case, or to any extent, or for any purpose, where the validity of an instrument set up as his will, is in controversy, why should they not be admitted in a case like the present? This paper, if it be testamentary in its character (a question not to be now decided) *can be effective only as a will of personalty. It does not profess to pass real estate, and was not attested by witnesses.*"

. . . . . .

(P. 393). "But in thus sustaining the ruling excepted to, it must be distinctly understood that we hold that such declarations would not be admissible *if they stood alone, and had not been preceded by the direct proof of witnesses as to the genuineness of the handwriting. They are not to be taken as direct*

> *proof to establish the paper*, but merely as corroborative of such direct proof, or as a circumstance in a case of this character, where such direct evidence had been first given, proper for the consideration of the jury. Besides the English authorities referred to, we think the admission of such testimony under such circumstances, and for such purpose, is sustained by the majority of American cases few as they are, in which this question has directly arisen, been considered and expressly decided. Turner *vs.* Hand, 3 Wallace, Jr. 92; Taylor Will Case, 10 Abb. Pr. Rep. 300; Johnson *vs.* Brown, 51 Texas Rep. 65; Beadles *vs.* Alexander, 9 Baxter Tenn. Rep. 604."

Before considering the reasoning of the opinion, it will be advantageous to present a careful analysis of the cases relied upon in support of the decision. These cases are: Doe *vs.* Hardy, 1 Moody & Rob. 525 (cited on page 390 of the opinion) and Turner *vs.* Hand, 3 Wall, Jr. 88; Taylor Will Case, 10 Abb. Pr. Rep. 300; Johnson *vs.* Brown, 51 Texas, 65; Beadles *vs.* Alexander, 9 Baxter, 604; Sugden *vs.* Lord St. Leonards, L. R. 1 Prob. Div. 154, and Gould *vs.* Lakes, L. R. 6 Prob. Div. 1 (cited on page 394 of the opinion).

All these cases will be considered in the order above cited.

(*a*) *Doe ex. dem. Ellis* v. *Hardy, 1 Moody & Rob. 525:*

This is but the note of a trial at *nisi prius* in 1836, and the report is so brief that it is here printed in full, except the title:

> "The question in this ejectment was whether the lands sought to be recovered had passed by a codicil, said to be executed by Henry Sedcole, in 1821. The defense was, that the alleged codicil was a forgery. An *admitted codicil*, devising the property in question to the lessor of the plaintiff, dated in 1806, was put in, attested by only two witnesses, without objection for the lessor of the plaintiff, and declarations of the

testator of his intention that the lessor of the plaintiff should have the property were offered.

"These were objected to by Butt for the defendant.

"Littledale, J.: 'I think the declarations of the testator are admissible to show his intentions, where the defence is either fraud, circumvention, or forgery.'

"Verdict for the plantiff, with leave to the defendant to move on another point.

"Earle and Barstow for the plaintiff.

"Butt and Fitzherbert for the defendant."

The case is so meagrely reported as to make it impossible to apply the decision, and it cannot therefore be regarded as an authority, altogether apart from the fact of its being a hasty ruling at *nisi prius* where the court appears to have doubted the decision of the case and given the defendants leave "to move on another point."

The precise character of the declarations offered does not appear. It is impossible, from this meagre report, to determine whether they were offered in support of the admitted or the disputed codicil. It would seem the declarations were offered by the plaintiff in support of his case, but even this is by no means certain.

If, however, the declarations were in effect such as showed a knowledge or recognition by the testator of the disputed codicil such evidence would of course have been admissible, not to prove the execution of the paper, but simply to show knowledge of its existence and contents. Knowledge of the existence and contents of the paper would fairly tend to indicate genuineness because, if forged, it would be extremely improbable that the testator should have had any knowledge on the subject or even any means of knowledge.

But there is ample ground for saying that the *nisi prius* decision in Doe *vs.* Hardy is not authority, even in England, for the admission of the declarations of a testator as to his intentions or state of mind on the issue of execution *vel non*. In Atkinson *vs.* Morris, L. R. Prob. Div. (1897) 40, an at-

tempt was made to establish the execution of a will by the declarations of the testatrix. The Court of Appeal held the evidence inadmissible. During the argument Lord Russell asked defendant's counsel (p. 43):

> "Is there any case in which declarations of a testator have been admitted to prove the execution of his will?"

And defendant's counsel replied that they "are not aware of any." Surely, if this case was of sufficient authority to be the foundation of the decision in Hoppe *vs.* Beyers and in this case, it is remarkable that the judges in the Court of Appeal in Atkinson *vs.* Morris should not have known of it, and that counsel should not have cited it.

(*b*) *Turner* v. *Hand, 3 Wall. Jr. 88:*

This also is a report of proceedings at *nisi prius.* The case was tried in the Circuit Court of the United States, in 1855, before Mr. Justice Grier, and is a branch of the litigation over the will of Jonathan Meeker, already referred to (*supra*, p. 126) in the discussion of the case of Boylan *vs.* Meeker, 4 Dutcher, 274.

The action was ejectment; the plaintiff claimed under Boylan, who claimed under the will of Jonathan Meeker. The issues, as shown by the report, were *forgery* and *mental incapacity* (p. 89). In the course of the trial, objection was made to the offer to prove declarations of the testator, and Mr. Justice Grier passed on the objection in the following language (p. 92):

> "Testimony of the sort proposed is, generally speaking, not admissible; but when you have strong proof that the paper offered as a will is a forgery, and the issue is *fraud* and forgery, I think it is competent as *tending* to prove the issue. It is, however, a somewhat dangerous kind of evidence; and a court must hold a tight rein over it, in charging the jury

as to its legal effect, in relation to the positive and unimpeached evidence of execution."

Mr. Justice Grier appears, however, after consideration, to have repented of his ruling admitting the evidence, in his charge to the jury with reference to it saying (p. 107):

> "*It would be a very dangerous practice if courts were to allow the parol declarations of a testator to be given in evidence* to a jury in order to set aside a legally attested will. Why does the law require certain solemnities in order to a valid testamentary disposition of property? It is because of the fraud and perjuries which would be a necessary consequence of suffering a man's property to be the sport of loose conversations."

As appears from that charge, the will was proved by five witnesses present at its execution, three of them subscribing witnesses (p. 113); and as to four of them, the court says their—

> "characters are wholly unimpeached. Their standing, their education, their manners, are of the best in society. They relate facts and circumstances which it was impossible for them to know if not true" (pp. 113, 114).

It is plainly apparent from the passages of the charge above quoted, and other similar ones condemning in even stronger language this class of evidence, that the learned justice did not intend that the declarations he had casually admitted should have any effect upon the minds of the jury, and they obeyed the court's injunction, disregarded the evidence admitted, and returned a verdict supporting the will.

Mr. Justice Grier's ruling could not be reviewed by an appellate court because, owing doubtless to his strong charge to the jury condemning the evidence, the parties against whom it was admitted prevailed at the trial. Had the re-

sult been otherwise the case would have been brought to this court and the question would not now be open for discussion here.

As already shown (*supra*, pp. 125 *et seq.*) however, when the questions involved in the case were heard in an appellate court, the Supreme Court of New Jersey took an entirely different view of them.

(c) *Taylor Will Case, 10 Abb. Pr. N. S. 300.*

This case, like the two preceding ones, was also a ruling at the trial, in the court of first instance, and was tried on the *facts* as well as the law by the Surrogate in 1871.

The grounds of contest are set out on page 302. The second *denies that the alleged testator signed the paper;* the seventh that he was of sound mind; the eighth and ninth assert fraud, circumvention and undue influence.

Apart from the objections to this decision as authority, to be hereafter shown, a careful examination of the language used by the Surrogate, will not, it is submitted, give any support to the conclusions reached in Hoppe *vs.* Beyers. He says (pp. 306–307):

> "The contestant claims it is not genuine, and has offered letters of the decedent to show declarations, and, indeed, they were offered *as declarations*—made subsequent to the date of the instrument, of such affection towards the contestant, as to be inconsistent, as her counsel claims, with the provisions of the paper in question; and that evidence was, I think, properly received, as well in respect of the question of *genuineness* as that of alleged *undue influence.* It was, doubtless, offered as to both grounds, and, if I remember the other testimony of contestant correctly, I am strongly of the conviction that a fair and proper trial of this cause requires me, on established rules of evidence, to receive such declarations as are offered to be proved *in legitimate rebuttal of the evidence for the contestant*; that is, such declarations as were made by the decedent during the short

period of his life after the date of the paper, [The will was dated June 30, 1870. The testator died August 22, 1870] *that he had made a will, with any statement by him of its provisions as correspond with, so as to identify, the paper as the one referred to.*

"To exclude such declarations would be as it appears to me, to reject matter, to say the least, clearly *not immaterial* to the principal question I am to determine upon this paper. The evidence should, however, be taken not as direct proof, but only as corroborative of the testimony of the *factum.*"

Again the Surrogate, after commenting on the latitude allowed the contestant in the matter of declarations, going back to 1867, says (p. 323):

"I yet limited the *proponents* in their offers of declarations of the decedent as to his making or having made a will (in rebuttal of the allegation of forgery of the propounded paper) *to declarations made by the decedent after the date of the paper now in question that he had made a will, with any statements by him of any of its provisions corresponding with, so as to identify the paper as the one referred to.*"

Thus it appears that the ruling in that case was founded upon a question of *proper rebuttal evidence.* Declarations in behalf of the ~~the~~ contestant appear to have been received without objection, the contestant, however, objecting to similar evidence in rebuttal.

This ruling, therefore, limited the evidence of declarations to such as tended to identify the paper; thus admitting the evidence not as showing the dispositive intent, but as showing knowledge of the existence and contents of the paper alleged to be forged.

When, however, the Surrogate comes to the question of weighing the evidence, he shows how utterly inadmissible such declarations really are when he says (p. 322):

"It only remains now for me to consider the value, force and effect of the evidence of the contestant

offered as showing or tending to show that the instrument is wholly inconsistent with the affection, acts and declarations of the decedent towards or in respect of his granddaughter; and if so wholly inconsistent I am asked to decide that the paper is not genuine and that the subscribing witnesses have committed wilful and corrupt perjury, besides being accessory to the crime of forgery."

The case was appealed from the Surrogate to the General Term of the New York Supreme Court, but upon what grounds cannot be ascertained, as it has never been reported. It does appear, however, from the report in the Court of Appeals, *infra*, that the judgment of the Surrogate sustaining the will was affirmed by the Supreme Court, and from this an appeal was taken to the Court of Appeals. The Court of Appeals *reversed* the judgment of the General Term, which had affirmed the judgment of the Surrogate, and remanded the case for trial by a jury. Howland *vs.* Taylor, 53 N. Y. 627, 628 (1873).

While it cannot be ascertained what were the questions presented upon either appeal, it is quite safe to assume that the General Term of the Supreme Court, which had in 1869, in the case of Johnson *vs.* Hicks, 1 Lans. 150, held such declarations to be inadmissible on a question of forgery, did not overrule that decision in 1871.

As the Surrogate passed upon both the law *and fact*, it was not necessary for the General Term of the Supreme Court to affirm or reverse his rulings on this question. If they considered that the evidence properly admitted sustained his judgment, they could not, as in a jury trial they must, reverse because he also considered improper evidence. Indeed, in this case and all others where the judge tries both law and fact, his rulings upon the admission and exclusion of evidence are, in general, not ground for reversal, the only question on appeal being, is there sufficient competent evidence to sustain the decree. For this reason de-

cisions in cases in equity, in admiralty, in the Ecclesiastical Courts and in Common Law Courts where a jury is waived, and in all other courts where the judge tries both law and fact, are not authority on questions of the admission or exclusion of evidence in jury trials at common law.

1 Greenleaf on Evidence, (15th Ed.) p. 75:

> "Sec. 49. Functions of judge and jury. In trials of fact, without the aid of a jury, the question of the admissibility of evidence, strictly speaking, can seldom be raised; since, whatever be the ground of objection, the evidence objected to must, of necessity be read or heard by the judge, in order to determine its character and value. In such cases, the only question, in effect, is upon the sufficiency and weight of the evidence."

In Field and Others *vs.* U. S. 9 Peters, 182 (1835), Mr. Chief Justice Marshall says (p. 201):

> "In regard to the bill of exceptions, as the cause was by consent not tried by a jury, the exception to the admission of evidence was not properly the subject of a bill of exceptions. But if the District Court improperly admitted the evidence, the only effect would be, that this court would reject that evidence, and proceed to decide the cause, as if it were not in the record. It would not, however, of itself, constitute any ground for a reversal of the judgment."

In U. S. *vs.* King et al., 7 Howard, 833 (1849), Mr. Chief Justice Taney in delivering the opinion of the court, says (p. 854):

> "Neither is it necessary to examine in detail the exceptions taken at the trial to the admission of testimony. In some unimportant particulars, the evidence objected to was not admissible. But where the court decides the fact and the law without the intervention of a jury, the admission of illegal testimony, even if material, is not of itself a ground for reversing the judgment, nor is it properly the subject of a

bill of exceptions. If evidence appears to have been improperly admitted, the appellate court will reject it, and proceed to decide the case as if it was not in the record."

In Arthurs et al. *vs.* Hart, 17 Howard, 6 (1854), Mr. Justice Nelson says (pp. 12–13):

"As to the other objection. It was held, in Field and others *vs.* The United States, 9 Pet. 182, and recognized in several subsequent cases, that in a cause where the trial by jury had been waived, the objection to the admission of evidence was not properly the subject of a bill of exceptions; and the reason given is, that if the evidence was improperly admitted this court would reject it, and proceed to decide the cause as if it were not in the record. This, perhaps, is unobjectionable; it certainly is so, as far as the evidence improperly admitted bears upon a question of fact in the cause; for, when rejected, if there is still any proper evidence tending to support the judgment of the court below, the decision can not be reviewed on a writ of error. The error, in this aspect, would be unimportant, because not the subject of an exception, the question involved being one of fact.

"If, upon the rejection of the evidence, no testimony would remain necessary to support the judgment of the court, then the mistake would be one of law, and the proper subject of a writ of error.

"The case of the refusal of proper evidence on the trial is subject to very different considerations from those applicable to the improper admission of it. The exclusion of the evidence might change the legal features of the cause, and lead to a determination of it upon principles wholly inapplicable, in case the evidence had been admitted; nor can we assume that the testimony offered and rejected would have been proved, if it had not been excluded, and revise the judgment of the court upon that assumption; because the offer of evidence to prove a fact, and the ability to make the proof, are very different matters. If the court, instead of rejecting, had allowed the

evidence, the party might have failed in the proof, and the case in the result remain the same as before the improper exclusion.

"We think, therefore, that the improper rejection of testimony on the trial before the judge, where the jury has been dispensed with, should constitute the subject of review on the writ of error, as in the case of a trial before the jury."

In Mammoth Mining Co. *vs.* Salt Lake Foundry and Machine Co., 151 U. S. 447 (1894), Mr. Chief Justice Fuller says (p. 451):

"As to the errors assigned in that court [the Supreme Court of Utah] to the admission of evidence, the Supreme Court observed: 'These errors are not available in a case in equity, for the chancellor is supposed only to act on proper evidence. There is no question of law involved, only questions of fact; and if the proper evidence justifies the decree, the judgment ought to be affirmed, and we think it does.' In its assignment of errors here, appellant specifies substantially the same exceptions to the admission of evidence, including the overruling of defendant's objections to questions. The evidence thus objected to was cumulative in its character and not of controlling importance, and if excluded, it is sufficiently clear that the result would not have been otherwise than it was. All the evidence is in the record, and we have carefully examined it, and, as we are of opinion that the rulings complained of, if erroneous, did not constitute reversible error, we need not pass upon their corrrectness, though we are not to be understood as intimating that the objections should in any instance have been sustained."

In Grayson *vs.* Lynch, 163 U. S. 468 (1895), Mr. Justice Brown, says (p. 476):

"We think there is nothing in this statute to take this case out of the general rule, so frequently announced, that in cases where a jury is waived, the

> findings of fact by the court have the same force and effect as the verdict of a jury, and that the appellate court will not set aside the finding and order a new trial, for the admission of incompent evidence, if there be other competent evidence to support the conclusion."

The same rule prevails in the courts of New York.

In Brick *vs.* Brick, 66 N. Y. 144–156 (1876), which came up on appeal from the surrogate's degree, Rapallo, J., for the court, says:

> "In this class of cases the admission of improper evidence is not ground for reversal if it appears on the whole case that the will was properly admitted to probate (Clapp *vs.* Fullerton, 34 N. Y. 195; Schenck *vs.* Dart, 22 id., 421)."

In Clapp *vs.* Fullerton, 34 N. Y. 190–195 (1866), Porter, J., says:

> "The admission of improper evidence on the original hearing [before the surrogate] furnishes no ground for reversing the final decision, if the facts established by legal and competent testimony are plainly sufficient to uphold it."
>
> See, also, In re Paige, 62 Barb. 476–479 (1871), and Will of Smith, 95 N. Y. 516–527 (1884).

In re Crawford, 5 L. R. A. 71 (1889), Mr. Justice Peckham, in reviewing on appeal a surrogate's decree, speaking for the Court of Appeals of New York, says* (pp. 77–78):

> "It is objected that the evidence thus received was incompetent under section 829 of the Code, and also because it was a declaration of the intestate which did not accompany an act, and was not a part of the *res gestæ*. If it be assumed that the evidence was erroneously received on both grounds, we do not

---

*The portion of the opinion quoted is omitted by the reporter from the official report of this case, 113 N. Y. 560, as appears by his note at page 568.

think that any reason exists for reversing the determination of the surrogate as to the moneys deposited. Striking out all the objectionable evidence, and there remains enough uncontradicted and legal evidence to call for the decision of the question of gift, or no gift, in the same way as it now stands.

"The same question arising under the evidence of Dr. Boyd may be answered in the same way. . . . Strike it out, and there is evidence sufficient remaining (which is uncontradicted) to demand the decision which the surrogate made. Without, therefore, deciding the question as to the admissibility of the evidence, we think the surrogate's decision regarding the gift was proper in any event."

(*d*) *Johnson* v. *Brown, 51 Texas, 65:*

This is a decision by an appellate court, rendered in 1879, and is the first and only decision by such a court upon this question, cited in the opinion in Hoppe *vs.* Beyers.

Judge Bonner, in delivering the opinion in that case (p. 80), holds that the declarations of the testator were—

"properly admitted in evidence—not of themselves as proof sufficient to overcome the testimony of the subscribing witnesses, but as a circumstance, in a case of this character, proper for the consideration of the jury in connection with all the other facts and circumstances in evidence; that they are not so much declarations disparaging a duly executed will, as evidence of an independent collateral fact—the state of feeling between the parties—and which would in some degree tend to prove the issue before the court."

It is not altogether clear upon what grounds the conclusion reached by the court in that case is based; but if the decision is to be taken as holding such declarations admissible on the question of execution, it is unequivocally overruled by the subsequent case of Kennedy *vs.* Upshaw, 64 Tex. 411, (cited *supra*, p. 141,) in which it is distinctly held that such declarations are inadmissible, the court in the

latter case adopting the doctrine laid down by Redfield and by the court in Boylan *vs.* Meeker, 4 Dutcher, *supra.*

It is a somewhat remarkable circumstance, indicating the obscurity of the opinion in the case of Johnson *vs.* Brown, that in Kennedy *vs.* Upshaw counsel on each side cite it in support of both the admission and exclusion of the testimony (64 Tex. pp. 413, 414), and the court cites it as authority for *excluding* the evidence (p. 419).

It is respectfully submitted that the opinion of Judge Bonner in Johnson *vs.* Brown can not be regarded as a safe guide to judicial decision; and being an overruled case, it can furnish no support to the opinion in Hoppe *vs.* Beyers.

(*e*) *Beadles* v. *Alexander, 9 Baxter, 604:*

In this case, decided in 1877, no claim of forgery was made, the only question being whether the testator had signed in the presence of the subscribing witnesses. One of the witnesses was dead, and the other testified to the signing by the witnesses, and that "according to his recollection the testator was not present."

The declarations admitted were to the effect that the testator had himself taken the will to the witnesses to sign. The court concedes that these declarations were hearsay, but seems to think they were hearsay of a somewhat superior order, saying (p. 606):

> "They do not stand as mere hearsay declarations *of other parties.* They are the declarations of the testator *as to his own acts,* and about which he must certainly know; and, in general, he has no motive to speak falsely, and both parties claim under him, one as devisee or legatee, the other as distributee and heir. His declarations are not introduced to establish the particular fact by force of the admission or statements alone, but for the purpose of corroborating and supporting the presumption arising from the fact that the will bears the genuine signatures of two competent subscribing witnesses, and to contradict

the testimony of the witness who, although he admits his signature, yet denies the testator's presence."

In support of this ruling the court relies upon the case of Reel *vs.* Reel, 1 Hawks, 248, and the other North Carolina decisions resting upon the now thoroughly exploded doctrine that such declarations are admissible as the declarations of a party in interest against his interest or in disparagement of his title.

This doctrine is fully met and effectually disposed of by Selden, J., in Waterman *vs.* Whitney, 11 N. Y. 157–164, as follows:

> "In one of Cowen and Hill's Notes to Phillipps on Evidence (see n. 481, p. 257) it seems to be insisted that the declarations of a devisor are admissible against the devisee, upon the same principle with those of an ancestor against the heir, or of a grantor against his grantee. Perhaps they may be, where the declaration is in regard to the estate; but where it has reference to the validity of the will, the case is entirely different. Declarations of an ancestor, grantor, &c., are admitted, because they are against the interest of the party making them, and might when made have been used against him. *But these reasons do not apply at all to the declarations of a testator in regard to his will. He has no interest in the matter, and the declaration could never under any circumstances be used against him personally. The distinction is obvious and material.*"

Further very conclusive demolition of this doctrine of Reel *vs.* Reel and the cases following it will be found in the opinion of Mr. Justice Brewer, in Mooney *vs.* Olsen, 22 Kans, 69, 76 (1879); in Johnson *vs.* Hicks, 1 Lans. 150, 158, and in Boylan *vs.* Meeker, 4 Dutch. 274–289.

Entirely apart from the unsoundness of the decision in Beadles *vs.* Alexander, that case has no application to the question under consideration in Hoppe *vs.* Beyers, and can therefore in no way support the conclusions there reached.

(*f*) *Sugden* v. *Lord St. Leonards, L. R. 1 Prob. Div. 154.*

This case is referred to in a postscript to the opinion.

It has already been shown what the questions in this case were (*supra*, pp. 104–105). There was no question of forgery, the execution of the will being admitted and the only questions were whether the contents of the will could be proved by parol and whether the presumption of revocation from non-production at the death of the testator could be rebutted by declarations of the testator.

Instead of being an authority in support of the admission of declarations to prove or disprove execution, it is directly opposed to their admission for such purpose. Thus, Cockburn, Ch. J., passing on these questions in the appellate court, says (p. 226):

> "I entertain no doubt that prior instructions, or a draft authenticated by the testator, or verbal declarations of what he was about to do, though, of course, not conclusive evidence, are yet legally admissible as secondary evidence of the contents of a lost will. There are no doubt cases in which the declarations of a testator are inadmissible. Thus a statement by a testator that he had duly executed his will could not be received as evidence of its due execution, as was decided in the Goods of Ripley (1 Sw. and Tr. 68), and there is good reason for the decision, namely, that the exercise of the testamentary power, being conditional on the observance of the formalities prescribed by statute, a man cannot, by his own mere assertion, establish that he has fulfilled the conditions necessary to the exercise of the right."

And further on (p. 229), discussing the ruling in Doe vs. Palmer, (16 Q. B. 747, 20 L. J. Q. B. 367), he says:

> "What it comes to is that the declarations of a testator cannot be used to prove that the execution of the will was such as to give effect to it. The dictum of Lord Campbell does not really, any more than the decision in the case, affect the question of the admissibility of the declarations of a testator as to the

contents of his will where the execution is not the question.

He concludes his discussion of the question in the following terms (p. 229):

> "I am, therefore, of opinion that the various statements of Lord St. Leonards, whether before or after the execution of his will, are admissible *to prove its contents.*"

In this case, also, the court tried both the law and the facts and the rulings are therefore not authority in common law trials before a jury.

That the doctrine announced in Sudgen *vs.* Lord St. Leonards is not to be followed to the full extent of the language used as a correct statement of the law, even in England, will be seen by reference to the decision of the House of Lords in the case of Woodward *vs.* Goulstone, 11 Appeal Cases, 469, (1886), in which Lord Herschell, the late Lord Chancellor, Lord Blackburn, and Lord FitzGerald criticize the extent to which that case went, and while not expressly overruling it, expressly withhold the approval of the House of Lords from it as authority to its full extent, Lord FitzGerald saying (p. 485):

> "That case might be truly said to have reached the very verge of the law and it ought not to be extended."

(*g*) *Gould* v. *Lakes, L. R. 6 Prob. Div. 1.*

This is the last decision cited in the opinion in Hoppe *vs.* Beyers, and like most of its predecessors is a decision at the trial in a court of first instance where the judge tried the fact as well as the law.

It has already been shown (*supra*, p. 105) that the question in this case had nothing to do with the fact of execution, which was not in issue, but concerned only the question

whether both of two sheets of paper stitched together were the will of the testatrix, or only one of them.

The case has no possible relevancy to any question arising in Hoppe *vs.* Beyers, and can give it no support.

From this review of the cases relied on it is clear that the opinion in Hoppe *vs.* Beyers stands unsupported by any authoritative decision.

What is still more remarkable, and probably explains the decision in that case, is that while the court was groping its way in the dark and regretting the absence of precedent to guide it, it seems not to have been advised that there were authoritative decisions of appellate courts plainly in point and deciding the question in direct opposition to its conclusions.

The cases of Boylan *vs.* Meeker, decided by the Supreme Court of New Jersey in 1860; Johnson *vs.* Hicks, 1 Lansing, decided by the Supreme Court of New York in 1869, and Hayes *vs.* West, 37 Ind., decided by the Supreme Court of Indiana, in 1871, had all been reported before the decision of Hoppe *vs.* Beyers (June 20, 1883), yet none of these decisions is referred to by either the court or counsel in that case.

(*h*) *The Reference to Text-writers.*

In addition to the foregoing references to decided cases, the opinion in Hoppe *vs.* Beyers refers to certain text-books on Evidence and Wills in connection with the *nisi prius* decision in Doe *vs.* Hardy as supporting its conclusions. The first reference is to Taylor on Evidence. It is quite true that Taylor, in his work on Evidence (Am. Ed. from 8th Eng.) p. 968, Sec. 1136, makes use of the following language:

> "The declarations of a testator are admissible to show his intentions if the will be impeached on the ground of fraud, circumvention or forgery."

And in support of this text he cites the cases of Doe *vs.* Allen, 8 T. R. 147 (1799), and Doe *vs.* Hardy, 1 Moody & Rob. 525 (1836).

In the first case, Doe *vs.* Allen, a decision at *nisi prius* in an ejectment, a second will was relied upon, which it was claimed was invalid because procured under a false representation. As stated in the report the evidence offered was—

> "that *at the time of the execution*, the testator enquired whether it was the same as the former, and was told that it was" (p. 147).

In ruling upon the admissibility of the evidence, Lord Kenyon says (p. 148):

> "And the effect of the evidence offered in this case was to shew that one paper was obtruded on the testator for another which he intended to execute."

And Grose, J., says:

> "It seemed to be admitted at the bar that evidence may be given to shew that one paper was substituted for another; and that I think is sufficient to decide this case. *For the evidence proposed to be given was this, that when the testator asked for a duplicate of his former will the persons about him substituted another instead of it.*"

Thus the question of forgery did not arise, the execution was admitted, and there was no declaration by the testator, but a question asked and falsely answered *at the very moment of executing the paper*; this was plainly of the *res gestæ*.

Doe *vs.* Hardy, the other case cited by Mr. Taylor, has already been fully discussed. These two cases being the exclusive foundation for the statement above quoted, the opinion in Hoppe *vs.* Beyers cannot be better supported by the text-writer than by the decisions on which he relies and which are shown to constitute no basis for his position.

Roscoe, in his work on *Nisi Prius* Evidence, does not discuss the question nor consider or cite other authorities, but simply says (14th Ed., 1879, p. 57):

> "On a somewhat similar principle the declarations of a testator as to his intentions are admissible *to support* his will if disputed on the ground of fraud, circumvention or forgery,"

and cites Doe *vs.* Hardy.

As, in his text he confines the admissibility of the evidence to the "*support*" of the will he probably understood the declarations in Doe *vs.* Hardy as tending to show such knowledge on the part of the testator of the existence and contents of the disputed will as would tend to rebut the charge of fraud or forgery. But there is certainly nothing in his text justifying the conclusions reached in the opinion in Hoppe *vs.* Beyers.

It is worthy of remark, however, that another distinguished writer on Evidence (Starkie) does not adopt the doctrine of Doe *vs.* Hardy, nor cite it, although he does cite and approve Doe *vs.* Allen. (Starkie on Evidence, 2d Ed., Vol. 2, p. 927; 10th Ed., *p. 672.)

Greenleaf in his work on Evidence does not mention the case of Doe *vs.* Hardy. Wharton in his work (Sec. 1009) cites it together with Doe *vs.* Allen, but only as authority for the proposition that where "fraud or coercion is alleged *in the concoction of a will*, such fraud may be proved by parol." He adds, however, in the same section: "But declarations uttered *long afterwards, in no sense part of the transaction*, can not be received to prove fraud."

Jarman cites the case, but confines it as authority to the proposition that the declarations of the testator may be received *in support of the will to rebut the charge of fraud.* (1 Jarm. on Wills, p. 390, 6th Am. from 5th English Ed.)

The only other text-book referred to in Hoppe *vs.* Beyers is Redfield on Wills, Vol. I (4th Ed.), p. 511, note 4.

The learned justice in this reference to Redfield as an

approval by that author of the case of Doe *vs.* Hardy was evidently misled by a most extraordinary lapse on the part of the editor of the edition cited.

The place in Redfield in which this case is found cited (under the erroneous reference of "1 Moo. & Ry. 525," there being no such report), is in a vagrant note, having no possible relation to the subject of the text there under discussion by the author. The text to which the note is appended is as follows:

> "So also, where a devise is induced by a contract with the devisor, creating a trust, in contravention of the express provisions of the statute, as the Acts of Mortmain, the devisee may be compelled to disclose the trust" (*p. 511).

Not only has this foot-note no sort of relevancy to the text above quoted, but it is submitted, is absurd on its face. The language of the note is that:

> "In *all cases* where fraud or forgery is alleged, the declarations of the testator either, before or after the execution of the will, have been received."

And in proof of this sweeping assertion as to the rule "in *all cases*" the writer of the foot-note cites a *single case*, and that one, as heretofore shown, the loose and ill considered expression of a judge at *nisi prius* in a vaguely reported case.

Such a generalization of the law, from an isolated episode at *nisi prius*, cannot bespeak for the writer of the foot-note sufficient confidence to become the basis of judicial reliance.

What is more important still, and shows how far the learned Justice of the Court of Appeals of Maryland was mislead in relying upon this foot-note, is that he nowhere notices and seems entirely to have overlooked the fact that, in that part of his book where Redfield does discuss this

question (*pp. 542–560), the learned author utterly repudiates the doctrine of this irrelevant foot-note and *distinctly approves in the body of his text* (*p. 557) the case of Boylan *vs.* Meeker, 4 Dutcher, 274.

It is therefore clear that the opinion in Hoppe *vs.* Beyers is wholly unsupported by authority, was against the weight of authority at the time, while in every decision since, the contrary rule has been declared.

The Decision in Hoppe vs. Beyers is Unsound in Principle and Reason.

The opinion in Hoppe *vs.* Beyers, while opposed by the decision of every other appellate court in which the question has been considered, on examination, will also be found not to rest on sound reason. The will in that case was an informal, unattested paper written on the back of a letter, and it would seem from the report of the case, that the only evidence of its execution was that of handwriting which was contradicted. This circumstance appears to have impelled the court's decision, because it says (p. 391):

> "There was no witness who could prove that he saw the deceased write or sign it. Proof as to his handwriting by witnesses acquainted with it, was the only *direct* testimony by which the genuineness of the instrument could be established or assailed. . . . But in this state of case was no other evidence admissible?"

It not infrequently happens that the decision of a case is embarrassed by the paucity of evidence to enlighten those who have the duty of deciding it, and hardship, and doubtless injustice, have sometimes been suffered for lack of evidence to support the right, but such cases do not, it is submitted, justify a disregard of the rules of evidence.

There is no possible means of providing against the death of witnesses and the law has always been, even in respect of

those writings to which subscribing witnesses are required, that proof of handwriting alone in the event of death or inaccessibility of such witnesses will suffice. Indeed, if the will be more than thirty years old, the mere production of it from the proper custody is sufficient to prove it without any evidence of handwriting or other evidence of execution. 1 Greenleaf's Ev. (15th Ed.), Sec. 21.

If the fact that no witness can testify to the physical act of signing or writing of a paper be ground for admitting this class of evidence there is little use in having written evidence of any thing.

A very large and important part of the business of the world depends and is conducted upon faith in the ability of persons to recognize the handwriting of one another and to determine its genuineness without the aid of witnesses to the act of writing.

The purpose of the law in requiring wills to be in writing is that their establishment may not depend upon just such evidence as was admitted in Hoppe *vs.* Beyers. According to the opinion in that case, if the genuineness of the writing be disputed, the declarations of the testator are to be admitted for the purpose of showing whether the provisions of the will are consistent with the intentions which those declarations seem to indicate and from this to determine the probability or improbability of his having written the paper. As no one can pretend to actual knowledge of a testator's intentions, nor even to remember and repeat all of his declarations or his exact words, but can only give the substance as it is understood by the witness, the validity of the most important will, executed in the most solemn manner, is made at once to depend upon the impressions which the testator may have made of his purposes upon those who may have observed his actions or heard his remarks, without reference to his real purposes or the motives by which he was actuated at the time.

When to this is added the facilities for corruption and

perjury which such a rule would afford, its impropriety and danger are at once apparent.

It is true, that the court says of those declarations that (p. 393):

> "They are not to be taken as direct proof to establish the paper, but merely as corroborative of such direct proof."

It is to be remembered, however, that the weight of such evidence, is for the jury; and once it is admitted for their consideration, the court's control of its use is at an end, except by setting aside the verdict.

In a previous part of the opinion the court says (p 391):

> "If declarations of a deceased party are admissible in *any case*, or to *any extent*, or for *any purpose*, where the validity of an instrument set up as his will, is in controversy, why should they not be admitted in a case like the present?"

It is respectfully submitted that this question admits of a simple and very obvious answer; namely, the difference in the issues.

The competency of all evidence, when objected to as irrelevant, is to be determined by the issue to be tried.

In cases where malice and fraud are in issue, the intent of the person charged is material and relevant; while in mere breaches of contract or torts from negligence, motive and intent are immaterial, the act and consequent injury alone being the subject of inquiry.

So, also, where the issue involves the mental condition of the testator, all his acts and declarations are direct original evidence to show his mental condition; but where the mental condition is not in issue, evidence upon that subject is as inadmissible as would be evidence of handwriting upon an issue of mental capacity, where execution is admitted.

Again, the court says (p. 393):

> "But in thus sustaining the ruling excepted to, it

> must be distinctly understood that we hold that such declarations would not be admissible if they stood alone, and had not been *preceded* by the direct proof of witnesses as to the genuineness of the handwriting. They are not to be taken as direct proof to establish the paper, but merely as corroborative of such direct proof."

How the declarations of the testator as to his intentions could corroborate the "direct proof of witnesses as to the genuineness of the handwriting" is not explained.

The *opinion* of a witness as to the genuineness of handwriting must be based upon his knowledge of the testator's writing, acquired from actually seeing it, and not upon his knowledge of the testator's intentions, and it is impossible that the intentions of the testator could strengthen or weaken the mental image of the testator's writing from which such a witness testifies. So a witness testifying that he actually saw the testator write the paper in dispute could not be corroborated nor contradicted by the declarations of the testator's intentions.

If, therefore, the only ground of admitting the testimony is to corroborate evidence as to handwriting, as stated in the opinion, it is plainly not admissible at all.

The effect of the ruling in Hoppe *vs.* Beyers is this: Given a witness who will testify to the genuineness of the handwriting and one who will testify to its non-genuineness, at once the way is open to receive all the alleged declarations of the testator.

Thus the range of the evidence upon the issue of forgery under this rule is as wide as upon issues of mental capacity and undue influence, and the effect much broader in that from it the jury are to determine, not what manner of man the testator was or by what circumstances influenced, but whether he did the act.

The decision in Hoppe *vs.* Beyers, standing as it does, not only wholly unsupported by any authoritative decision,

but directly opposed by all, should certainly rest upon very solid foundations in reason to justify its adoption as the proper rule of law against the united authority of all other considered cases.

It is submitted that such foundation is shown to be wanting.

The General Character of the Evidence in Proof of Forgery Admitted Over Exception in This Case.

The error in admitting in evidence alleged declarations and acts of Judge Holt as tending to show his feelings or the state of his mind was accentuated by their remoteness, in point of time, from the date of the will. The general character of this evidence and its relation in point of time to the date of the will may be briefly detailed.

The court admitted in evidence, the testimony of Mr. Barclay, *that in November, 1893*, more than twenty years after the date of this will, Judge Holt had said he had made his will and left some pictures to Mr. Barclay's mother (Rec., pp. 28, 29).

Again the testimony of Mrs. Briggs that between 1888 and 1891, from fifteen to eighteen years after the date of this will, Judge Holt told her that Washington Holt would attend to his affairs, and it would be all right (Rec., pp. 36, 37). To this was added the admission in evidence of alleged declarations by Judge Holt to Washington Holt and others, claimed to have been made during the period from 1884 to 1893, from eleven to twenty years after the date of the will in controversy, to the effect that he had made a will containing various provisions wholly different from those of the paper in controversy (Rec., pp. 39, 40, 78, 79).

Also the testimony of Washington Holt, to the effect that in 1893, twenty years after the date of this paper, Judge Holt had said to Washington Holt: "Washington, I want you to know that everything I have is yours" (Rec., p. 79).

In connection with these alleged declarations of the

testator, the court also admitted in evidence alleged acts and declarations of Judge Holt, many years after the date of the will, as to his alleged kindly feelings towards various of his next of kin, who are not mentioned in the paper in controversy, *some of whom were not even living at the date of this will* (Rec., pp. 49, 50, 60, 67, 68, 78).

For instance, testimony of alleged declarations by Judge Holt, made in 1889 and later, more than sixteen years after the date of the will, as to his feelings towards James Holt, a brother who had died childless in 1867, six years before the making of the will in controversy (Rec., p. 68); so also testimony as to alleged declarations by Judge Holt, claimed to have been made in 1891, eighteen years after the date of the will, as to Mrs. Bowmer, a niece of Judge Holt (Rec., p. 68); and also testimony as to his personal relations in 1893, twenty years after the date of the will, with Mary Holt, a grandniece (Rec., p. 69).

The court also admitted in evidence, testimony of Mrs. Briggs that in 1881, eight years after the date of the will, she spoke to Judge Holt with reference to Mrs. Throckmorton, Sr., the grandmother of Josephine, the legatee, and he said: "I do not know the Throckmortons" (Rec., pp. 31, 34, 35, 36). That also, near the close of President Arthur's administation (1884 or 1885), eleven or twelve years after the date of the will, she had seen Judge Holt treat Major Throckmorton, the father of Josephine, with discourtesy at a Presidential reception (Rec., pp. 35, 36). Major Throckmorton, however, testifies that he was not present at the reception nor in Washington at the time (Rec., p. 110).

The court also admitted in evidence, the testimony of Martha Scott, a servant of Judge Holt, that subsequent to 1882, nine years or more after the date of the will, Judge Holt refused to see Mrs. Throckmorton, Sr., the grandmother of Josephine; that he refused to accept fruit and flowers from her (Rec., p. 82); and also the testimony of the same person, to the effect that after 1890, more than

seventeen years after the date of the will, Judge Holt declared that "the Throckmortons were his enemies, and that he did not wish to see them" (Rec., p. 82).

And the court also admitted the testimony of the same witness, to the effect that after 1892, more than nineteen years after the date of the will, Judge Holt had called Major Throckmorton, the father of Josephine, a scoundrel (Rec., pp. 82, 83), although the same witness testified that she *never heard Judge Holt speak unkindly of Josephine Throckmorton, the legatee* (Rec., p. 83).

The court also admitted the testimony of George A. Johnson, a coachman of Judge Holt, to the effect that from 1878 to 1880, from five to seven years after the date of the will, the relations between Judge Holt and Mrs. Throckmorton, Sr., the grandmother of Josephine, were very friendly; that Judge Holt placed his carriage at her disposal and had witness drive her wherever she wished to go, but that about 1880, seven years after the date of the will, he became hostile to the grandmother of Josephine (Rec., p. 83).

The will in this case, if genuine, was executed in February, 1873. The Record will be searched in vain for any evidence in the slightest degree tending to show that at that time Judge Holt's relations with the parties named in the will were in any respect inconsistent with the benefits conferred on them by that instrument. There is not the slightest pretence in the Record that he ever at any time declared his purpose to bestow any part of his estate upon any of the nine caveators in this case, except Washington Holt, and even as to this alleged purpose no expression to that effect is attributed to him at any time earlier than about ten years after the date of the will.

It is a significant fact also that while alleged oral declarations of his purpose to make a will in favor of Washington Holt are given in evidence, yet the mass of letters from

Judge Holt will be read in vain for a syllable of suggestion in that direction.

That Judge Holt was not averse to writing on such topics when so inclined, and in contrast with the utter absence of any written communication of this nature to any of the caveators, may be noted the letter to Miss Hynes of February 24, 1885, (Rec., p. 91) plainly intimating that she might expect further benefit from him by will.

A careful examination of this testimony, and indeed of all the evidence in the Record, will demonstrate that its purpose and tendency was to show a change in Judge Holt's personal relations with his kindred from a condition of practical non-intercourse with most of them prior to and about 1873, to a gradually increasing interest and regard beginning about 1880, in the course of which the wife of Washington Holt appears to have acquired an ascendancy over Judge Holt, to the exclusion of all his kindred, certainly in so far as financial benefit is concerned.

It must be constantly borne in mind in considering the question of the admissibility of this evidence that its *weight* is a question exclusively for the jury, over which the court can exercise no control.

When, therefore, any matter is admitted in evidence, it is for the jury alone to say whether they will believe it and what weight it shall have in their deliberations and conclusion.

Applying this principle to the evidence admitted, and the manner of its submission to the jury, it follows, of necessity, that if the jury believed that in 1893, when he was eighty-six years old and blind, Judge Holt said he had made a will leaving pictures to Mr. Barclay's mother, they could find that he did not make a different will twenty years before.

So, if they believed that in 1892 he had called Major Throckmorton a scoundrel, they could find that he did not entertain different opinions of him nineteen years earlier, although his written declarations before and after 1873

praise Major Throckmorton in almost extravagant terms, and no witness testifies to a single fact impeaching his character or to any fact, good or bad, upon which the alleged charge of scoundrelism was based.

So, also, if they believed that in 1889 he spoke kindly of a brother who had died childless in 1867, they could find that he had not made a will in 1873.

The Court of Appeals, as will be shown hereafter, held that the remoteness in time of the declarations from the date of the will in controversy was of no materiality, thus affirming that the issue of forgery could be determined by evidence of a state of feeling existing at *any* time during the testator's life.

If this doctrine is to prevail it will be seen that if at *any* time in his life a testator made, or be alleged to have made, declarations inconsistent with his will, a jury would, upon an issue of forgery, be permitted to find that at *no* time did he entertain the feelings indicated by the will, and from that conclude that he never executed it, which is the *reductio ad absurdum*.

Thus it will be seen that the testimony, instead of throwing any light upon the probable intentions and state of mind of the testator in February, 1873, at the time the will purports to have been made, ignores that time.

Whatever force evidence of that sort might have upon an issue of revocation, if there was any competent evidence laying the foundation for its introduction, it could shed no possible light upon the state of the testator's mind at the time the will purports to have been made.

Evidence Tending to Show Mere Probability, Inadmissible.

In the portion of the charge to the jury excepted to by the 36th and 37th Exceptions (Rec., p. 141), the court submitted to the jury all the evidence in the case, especially that admitted over objection—

> "*as bearing upon the probability, the likelihood*, of his having made such disposition of his estate as is made by this paper in controvery" (Rec., p. 131).

Even admitting that the foregoing and similar evidence could raise a logical probability against Judge Holt's having executed the paper, the probability would be too fanciful and conjectural to be allowed as a legal inference by the jury, and the remoteness of the declarations are an additional reason for their exclusion as evidence. While evidence which tends to prove the issue or from which justifiable legal inferences may be drawn tending to prove the issue, is to be admitted, evidence which simply raises a probability is incompetent.

In Thompson *vs.* Bowie, 4 Wall. 463 (1866), Mr. Justice Davis, in delivering the opinion of the court, says (p. 470):

> "Thompson brought suit in the court below to recover on three promissory notes, purporting to be given on the first day of January, 1857, by Bowie to Steer, and indorsed to him. Bowie sought to avoid their payment on the ground that they were founded on a gaming consideration, and therefore void, even in the hands of an indorsee, without notice, because the statute of 9th Anne, avoiding gambling contracts, was in force in the District of Columbia, where they were executed. There was no direct evidence offered on the trial to impeach the consideration of the notes; but what is called circumstantial evidence, in contradistinction to direct evidence, was relied on to prove the defence. A brother of the defendant was called by him, and allowed to testify; that whenever his brother was under the influence of liquor, he had a *propensity to gamble*, and it is contended, as he was drunk on the morning the notes were given, and as they were in the handwriting of a professional gambler, and payable to the keeper of a gaming-house, the inference is fair and reasonable, that they were given for money won at play.
>
> "Did the court err in admitting this evidence?
>
> "If it did err in this matter, then the judgment

must be reversed, for, undoubtedly, the jury, in the formation of their verdict, must have been greatly influenced by testimony that the general character or habit of Bowie was to gamble when intoxicated.

"All evidence must have revelancy to the question in issue, and tend to prove it. If not a link in the chain of proof, it is not properly receivable. Could the habit of Bowie to gamble, when drunk, legally tend to prove that he *did* gamble on the day the notes were executed? The general character and habits of Bowie, were not fit subjects of inquiry in this suit for any purpose. The rules of law do not require the plaintiff to be prepared with proofs to meet such evidence. That Bowie gambled at other times, when in liquor, was surely no legal proof that because he was in liquor on the 1st day of January, 1857, he gambled with Steer. It is very rare that in civil suits the character of the party is admissible in evidence, and it is never permitted, unless the nature of the action involves or directly affects the general character of the party. Bowie was not charged with fraud, or with any action involving moral turpitude. He was simply endeavoring to show that his own negotiable paper was given for money lost at play; and to allow him, as tending to prove this, to give in evidence his habit to gamble when drunk, would overturn all the rules established for the investigation of truth. When trying a prisoner on an indictment, for a particular crime, proof that he has a general disposition to commit the crime is never permitted. If a man charged with the larceny of a horse was proved—in connection with other evidence tending to show his guilt—to be drunk on the day the horse was stolen, would any court allow the general evidence to go to the jury that, when drunk, he always stole a horse? And yet, the general rules of evidence are the same in civil as in criminal cases.

. . . . . .

"The uniform habit of a party to loan money at usurious interest, was not considered by the Supreme Court of New York a legal foundation for a verdict

establishing usury, although one usurious loan had been proved between the parties to the suit, and it was altogether probable that the case under review was of that description (Jackson ex dem Norris *vs.* Smith, 7 Cowen, 719). The uniform habit of Bowie, when drunk, to gamble is not a legal foundation for this verdict, *although it is highly probable that the notes in controversy were executed by him for a gaming consideration.*"

Xenia Bank *vs.* Stewart, 114 U. S. 224, (1884), was an action to recover the value of certain stock certificates sold by the bank, the bank alleging that they were deposited as collateral for a loan which was overdue and unpaid.

Mr. Justice Woods delivering the opinion says (p 230):

"It further appears by the bill of exceptions that the plaintiff in error offered evidence to prove that, for more than a year previous to his death, McMillan had been 'hopelessly insolvent,' and had experienced 'great difficulty in procuring means to meet his interest obligations.' The defendants in error objected to this evidence, it was ruled out, and the plaintiff in error now assigns its exclusion as error.

"The purpose of the evidence was to prove that McMillan had not furnished the money to pay his note for $2,600 held by Hyde. The evidence offered was *inadmissible because too remote and conjectural. The law requires an open and visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences.* United States *vs.* Ross, 92 U. S. 281; Carter *vs.* Pryke, 1 Peake, 95; Hollingham *vs.* Head, 4 C. B. N. S. 388; Jackson *vs.* Smith, 7 Cowen, 717; Baird *vs.* Gillett, 47 N. Y. 186; Thompson *vs.* Bowie, 4 Wall. 463."

He then reviews the case last cited, and continues (p. 231):

"The evidence offered in the present case was too weak and vague to contribute to an intelligent decision by the jury of the question in issue, namely,

> whether McMillan had paid his note. It is common for both solvent and insolvent men to pay some of their debts and to leave some unpaid. Proof of the insolvency of a debtor is no more competent to show non-payment, than proof of his solvency is competent to show the payment of his debts. These two kinds of proof stand on the same footing. The latter kind has been held to be incompetent. Hilton *vs.* Scarborough, 5 Gray, 422. The insolvency and pecuniary embarrassment of a person may be shown as evidence that he has not paid all his debts; but they do not tend to show that he has not paid a particular debt. We think the evidence of the insolvency of McMillian was properly excluded."

This same principle has been applied to cases involving the validity of wills where the probability or improbability of the provisions were urged in support of, or against genuineness.

Thus in Rutherford *vs.* Maule, 4 Hagg. Eccl. Rep. 213 (1832), *supra* p. 50, Sir John Nicholl says (p. 226):

> "If then the act had been connected with the deceased, and the question had turned on her capacity, volition, or on fraudulent imposition, the high probability of the bequests would have had much influence on the decision; but as proof that the instrument is not a forgery, the probability of the bequests is of very little weight; for any person sitting down to forge a will would introduce into it probable bequests, and also bequests to those persons who would be best able to prove it a forgery, in order to conciliate and quiet them. Probability of disposition is, therefore, consistent either with the supposition that the paper is forged, or that it is genuine."

In Wood *vs.* Goodlake, 2 Curteis Eccl. Rep. 82, Sir Herbert Jenner says (p. 198):

> "But, after all, the probability of the disposition, in such a case as this, goes but a very little way in proving the act done. In those cases where the

> question is, whether the deceased was of sufficient capacity to execute the will, which is acknowledged to have been executed by him, in all such cases the probability of disposition is important; but where the question is, whether the act propounded is the act of the deceased, the argument founded upon probability is of very little weight indeed, for it would be the most unsatisfactory of all reasoning, to come to a conclusion that a certain act has been done because it is not improbable that the act might have been done. The court cannot act upon any such reasoning as that."

In the foregoing decisions, it is clearly affirmed that evidence which tends to show mere *probability* of the fact in issue is not admissible.

Here the court went even beyond the matter of mere probability and admitted evidence based upon the *possibilities* which might result therefrom. In the matter of the controversy between Judge Holt and Nick Ray, the evidence was admitted over objection upon that precise ground, viz: that it might tend to show whether—

> "the testator would have allowed such a will to stand under *the possibility* that some portion of the property which would pass thereunder *might ultimately* go to the said Nicholas Ray" (Rec., p. 95).

It is clear, therefore, that the tendency of all this evidence was not to prove the fact in issue—whether Judge Holt wrote the will—but to encourage speculation and conjecture as to possible grounds for his not writing it.

The Opinion of the Court of Appeals on the Questions Arising Under the Issue of Forgery.

The opinion of the Court of Appeals recognizes the importance of this branch of the case, concedes that the contention of the caveatees is supported by the weight of authority, and without discussing the cases or the principles upon which they rest, grounds its affirmance of the

judgment on the case of Hoppe *vs.* Beyers, 60 Md. 381, as will be seen by reference to the following passages of the opinion, viz. (Rec., p. 155):

> "This brings us to the consideration of the important question . . . whether the foregoing evidence was competent for the consideration of the jury in determining the issue joined on the genuineness of the will.
>
> . . . . . .
>
> "*The contention of the appellants is supported by the citation of many cases* denying the competency of such evidence, especially the subsequent declarations of the testator on that issue.
>
> . . . . . .
>
> "But it would serve no useful purpose to occupy time with their review and the discussion of their respective weight. As the question is *one of first impression* in this jurisdiction, we are free to adopt the conclusion that seems to us to be the most reasonable, and that *accords with the smaller number of cases* relied on by the appellees."

The court then cites Hoppe *vs.* Beyers and Turner *vs.* Hand, upon which, in part, the decision in Hoppe *vs.* Beyers rests.

The ground upon which the Court of Appeals justifies ignoring the weight of decision and following the single case of Hoppe *vs.* Beyers is that in its view "*the question is one of first impression in this jurisdiction*" and that it is therefore "free to adopt the conclusion that seems . . . to be the most reasonable."

It is, of course, true that no decisions except those of this court can be absolutely binding upon the Court of Appeals, but as the question now under discussion is one of the general law of evidence and in no sense a question of local law, it is submitted, that unless clearly wrong in principle, the current of judicial decision should be respected and followed. The Court of Appeals appears to have treated the opinion in Hoppe *vs.* Beyers as having so far considered

the decisions and reasoning in conflict with its own conclusion as to render it unnecessary for the Court of Appeals to examine or consider or even notice the array of authority against the rulings which it was about to adopt, for, in speaking of the decision in that case, it says (Rec.,p. 155):

> "The Court of Appeals of Maryland, after much consideration of the principles involved, *as well as the authorities*, declared the evidence competent."

Yet an examination of the opinion in Hoppe *vs.* Beyers will show that the court not only does not give "much consideration" to "the authorities," but on the contrary that it gives them no consideration whatever. The principles and reasoning of the cases to which it refers and upon which it relies are neither applied nor stated, while there is not the slightest allusion to any adverse decision, although the exhaustive discussion in Boylan *vs.* Meeker, and the decisions in Johnson *vs.* Hicks and Hayes *vs.* West had all been reported before the opinion in Hoppe *vs.* Beyers was rendered. Indeed, there is nothing in the report of the case indicating that any adverse decision was brought to the court's attention, and as no mention is made in the opinion of any such decision, it is a justifiable assumption that the court was not aware that any existed.

Whatever the fact may be in that regard, it is undeniable that neither in the opinion in Hoppe *vs.* Beyers, nor in the opinion of the Court of Appeals in this case, is any attempt made to distinguish the cases there under consideration from those holding the contrary doctrine, nor to show that the principle upon which the adverse decisions rest is in any respect unsound.

There is, therefore, presented to this court, a direct conflict of judicial decision upon this question, with the Appellate Court of Maryland on one side and the appellate courts of seven States on the other—a conflict which it is hoped this court will deem worthy of notice.

The Court of Appeals further says (Rec., p. 155):

> "We do not mean to say that such evidence would be competent to establish the execution and existence of an undiscovered will. . . . Nor would the same evidence be of *sufficient weight* to warrant the overthrow of a formal will produced and with execution proved by *living witnesses of unimpeached credibility.*
>
> "In fact, it was said in Hoppe *vs.* Beyers, *supra*, that, under circumstances like those just mentioned, the evidence ought to be excluded. But, whether, in such event, the objection would lie to its competency or its credibility, the evidence would have so *little weight that, if admitted, the court might properly charge the jury that it could not afford support for a verdict against the will.*"

The foregoing passages of the opinion of the Court of Appeals expose the error in the conclusions reached, namely, that the absence of "living witnesses of unimpeached credibility" justifies the admission of evidence which would be otherwise inadmissible.

Can the credibility of any witness ever give to or take from evidence the quality of relevancy? If the state of mind, feeling and intentions of a testator disclosed by his acts and declarations as bearing upon the probability of his having executed a will or not are relevant to that issue, can the "unimpeached credibility" of a witness or even of a thousand witnesses render it irrelevant?

Moreover, who is to judge of the "unimpeached credibility" of the witnesses, and who is to judge of the weight of the evidence? Is the evidence to be admitted in one case because the witnesses to execution are despised and disbelieved by the judge and to be excluded in another because he considers them witnesses of "unimpeached credibility"? Or, if admitted in both cases, are the jury to be told in one case they may believe and act upon it, and in another that though admitted for their consideration they

may not believe and act upon it, according to the judge's view of the "credibility" of the witnesses or the "weight" of the opposing evidence?

It is submitted that the weight of evidence and the credibility of witnesses can never be matters for determination by the court in jury trials at common law, and the exercise of such a function would be a mere lawless usurpation of power, and the proposition that because the "evidence would have so *little weight*" after being admitted that "the court *might properly charge the jury that it could not afford support for a verdict*" is a complete subversion of the system of trial by jury, and in direct opposition to the repeated decisions of this court.

In Greenleaf *vs.* Birth, 9 Pet. 292, 298, this court says:

> "Where there is *no* evidence tending to prove a particular fact, the court are bound so to instruct the jury, when requested; *but they cannot legally give any instruction which shall take from the jury the right of weighing the evidence and determining what effect it shall have.*"

And in C. & O. C. Co. *vs.* Knapp, 9 Pet. 541, 568, this court says:

> "The court ought not to instruct, and indeed *cannot instruct on the sufficiency of evidence.*"

This principle has also been announced by this court in equally positive terms in a long line of cases beginning in 1810.*

If this evidence be admissible upon an issue of forgery, it

*Maryland Ins. Co. *vs.* Rudden's Adm., 6 Cr. 338, 340; Crane *vs* Morris, 6 Pet. 598, 609-10-11; Ewing *vs.* Burnett, 11 Pet. 41, 50; United States *vs.* Laub, 12 Pet. 1, 4-5; Bank of Metropolis *vs.* Guttschlick, 14 Pet. 19, 30-31; Bareda *vs.* Silsbee, 21 How. 146, 166; Schuhardt *vs.* Allens, 1 Wall. 359, 370-71; Gregg *vs.* Moss, 14 Wall. 564, 569; Pleasants *vs.* Fant, 22 Wall. 116, 122; Baylis *vs.* Traveler's Ins. Co., 113 U. S. 316, 320-321; Met. RR. *vs.* Moore, 121 U. S. 558, 572-573; Russell *vs.* Post, 138 U. S. 425, 429-430; Aetna Life Ins. Co. *vs.* Ward, 140 U. S. 76, 88-89-91; Hedden *vs.* Iselin, 142 U. S. 676, 679-80.

could not become inadmissible because, in the opinion of the court the witnesses as to execution were persons of "unimpeached credibility," nor, if inadmissible, could it become admissible because in the opinion of the court the witnesses to execution were impeached, or not credible.

Had General Grant survived the testator and testified to the execution of this will he would doubtless have been believed by the jury. But if the evidence here complained of had been admitted and really tended, if true, to prove the will a forgery, upon which ground alone it could be admitted under this issue, there is no constitutional power in any court which could *compel* the jury to believe and give greater effect to the evidence of General Grant than to that of Mrs. Briggs, Mr. Barclay, Washington Holt, Charles Strothers, or the letters of Judge Holt.

The court could in such case have set aside the verdict rendered in opposition to General Grant's testimony, and it might have done this repeatedly, but it could never have compelled a jury to render a verdict to its liking.

That the Court of Appeals proceeded upon the theory that the *weight* of the evidence and the *credibility* of witnesses were questions for the court, in a case of this character upon the determination of which depended the admissibility of the evidence, is apparent from another passage of the opinion, in which the court says (Rec., p. 156):

> "By virtue of the statutory requirements in these respects, declarations before, at the time of, or subsequent to, the transaction inquired of, can not be received as *sufficient* to establish the same; nor should they be permitted to *override positive, unimpeached proof of execution.*"

If the evidence can not "be permitted to override positive, unimpeached proof of execution," why is it to be admitted at all? The court can not admit the evidence of one party to the suit as competent to maintain the issue and at the same time tell the jury they shall not give it

sufficient weight for that purpose. The jury alone, as above observed, are the judges of its weight and especially as to how far it may be "permitted to override positive, unimpeached proof" to the contrary.

Any other rule substitutes the court for the jury and renders the latter but a useless instrument of the court's will.

The Court of Appeals also speaks of the genuineness of the signatures being "assailed to *such an extent as to require the submission of the question of its forgery to the jury.*" It is not indicated by the court what amount or character of evidence would be required, but it is submitted that as the opinion of an expert or competent non-expert is all that is required to make an issue of forgery, the signature is assailed to a sufficient extent to require the submission of the question to the jury so soon as such opinion evidence is given against its genuineness.

That the supposed novelty and unprecedented character of the facts in this case had much to do with the affirmance by the Court of Appeals of the rulings of the trial judge is manifest from the following (Rec., p. 158):

> "In the *peculiar conditions of this case*, it seems to us that any evidence from which it might be inferred that the testator would, or would not, have made such a will, would be a material aid in resolving the doubt created by the other evidence whether he did or did not write and sign it."

The fair inference from this passage of the opinion is that had the facts been otherwise and the execution of the will been susceptible of proof by living witnesses, the court would have held the evidence inadmissible. This view of the opinion is strengthened by the court's frequent reference to the weight and credibility of evidence.

Yet, in the only cases by which the opinions in this case and in Hoppe *vs.* Beyers can pretend to be supported (viz., Turner *vs.* Hand, 3 Wall., Jr., 88; Taylor Will Case, 10

Abb. Pr. Rep., N. S, 300, and Johnson *vs.* Brown, 51 Texas, 65), the actual execution was proved by living witnesses of unimpeached credibility.

Indeed, in the case of Turner *vs.* Hand the fact of execution by Jonathan Meeker was proved by *five eye witnesses to the act*, three of them subscribing witnesses; and as to four of whom Mr. Justice Grier says (3 Wall, Jr., p. 113–114) their—

> "characters are wholly unimpeached. Their standing, their education, their manners, are of the best in society. They relate facts and circumstances which it was impossible for them to know if not true."

And though he indicated very strongly in his charge to the jury his convictions upon the weight of the evidence, he did not pretend to deny that it was the exclusive province of the jury to weigh the evidence and decide between this "positive, unimpeached proof of execution" on the one hand, and the weight of the declarations he had admitted on the other.

It was because of this undoubted power of the jury and the consequent destruction of the security given by the statute to written and formally executed wills, among other reasons, that the Supreme Court of New Jersey, in Boylan *vs.* Meeker, declined to follow the *nisi prius* ruling of Mr. Justice Grier upon the same question arising on the same will.

The Court of Appeals in its opinion (Rec., pp. 156, 157), quotes from Mr. Justice Grier's charge to the jury in Turner *vs.* Hand, in which, to illustrate his proposition, the learned justice supposes a case. It may be freely admitted that the case supposed would occasion surprise to those knowing the situations and relations of the testator, but not knowing any explanation of his action. The case supposed, however, is not the case at bar, nor was it the case on trial before Mr. Justice Grier, but, as abundantly appears from his charge, the

illustration was used by way of contrast, to show the jury the absurdity of giving any effect to the declarations which he had admitted in evidence in the case.

Proceeding further, in line with that illustration, suppose, in that case, that there were the gravest private reasons for the disposition made, of which unhappily none of the testator's acquaintance had knowledge, the disclosure of such reasons would of course at once explain away the apparent unreasonableness of the will and entirely justify it. Yet because no one is prepared to furnish the desired explanation, and notwithstanding the compliance of the testator with all the formal requirements of law as to its execution, the jury may find that he did not execute the will. The mere conflict in the evidence as to the physical act of execution is thus held to justify recourse to another conflict of evidence as to the testator's alleged acts and declarations, and if no one happens to be living or accessible who was so far in the confidence of the testator as to know the private motive for his act, his public acts and declarations, or such as may be attributed to him, must take the place of his solemn and formal testamentary act, and the consequence is that writing, instead of a security becomes a distinct danger.

The result from this course of reasoning is that a testator is to be denied the right of disposing of his estate for purely private reasons.

Again, for purposes of illustration, another case may be supposed. For example, a man of fortune, unmarried, and without children, but with collateral relatives toward whom he sustains the warmest and most affectionate personal relations, toward whom he expresses himself in every way to justify the belief that, as the natural objects of his bounty, they will also be the actual recipients of his estate, has an illegitimate child, the offspring of an obscure person toward whom he holds no relations. And suppose, as would not be improbable, that the father of such a child

would take especial pains to conceal his paternity, and that the illegitimate child should have no knowledge of who was its father, and, that the father, acting under a sense of parental obligation, and impelled by the impulses of conscience made a will making ample provision for such a child, without caring to disclose, by declarations in his lifetime or public record after his death, the illegitimacy of the child, or his own unlawful act in begetting him. The proof of the motives or intentions by which such a testator would be actuated would be impossible. He might avail himself of the aid of counsel and of the most reputable of persons as subscribing witnesses to his will, but it would be beyond human possibility that he could insure that the witnesses should survive him to prove his will. Yet, if the doctrines in this case are to be followed, no matter how clear the proof of his signature and that of the attesting witnesses might be, if others, largely influenced by their surprise at the nature and contents of the will, and honestly incredulous, should be found to express doubt as to the genineness of the signature of the testator and of the witnesses, the writing becomes practically a nullity because the testator has not seen fit to expose to those having no legal right to know, the motives which have impelled him in his testamentary act.

One may go on indefinitely supposing imaginary cases by way of illustration, but such illustrations can not alter what the law has provided, that wills shall be made in writing, that they shall be physical and not mental acts—written, not spoken words—and that they shall be proved by evidence tending to show the doing of a physical testamentary act without reference to the relations and state of mind of the testator, where the mental capacity of the testator and his freedom from the imposition of fraud and undue influence are not involved.

The Court of Appeals also says (Rec., pp. 157–158):

"Again, we are unable to perceive a distinction in

principle between the competency of declarations in a case like this where the *fact of execution* is in question, and in one where the will is assailed as *the product of fraud and undue influence.*

. . . . . .

"The question at issue in each class of cases is practically the same: Did the testator execute the paper of his own accord? Did he execute it at all?"

The duty of counsel to point out the distinction between the two cases, if there be any, is clear and plain, and not to be evaded, although the statement, by the court, that it is "unable to perceive a distinction" makes the discharge of that duty the more delicate and attends it with hesitation and embarrassment.

It is submitted, however, that there is a distinction and it is this: Where a person of sound mind and free from the imposition of fraud or undue influence is claimed to have made a will, the right to make it from natural or unnatural motives, from good or bad impulses, upon sound reasons or no reasons, from mere caprice, or from motives of the greatest secrecy, never to be known by man, is absolute and not open to question. The reasons for making it may be put on the face of the will, or concealed from all the world. It is obvious, therefore, that in such a case inquiries as to the purposes of the testator are not only idle, but may result in the defiance and defeat of his designs. To hold otherwise at once defeats the right of a testator to make a will at variance with his expressed or apparent intentions in life, but which is based upon undisclosed motives.

But in cases of fraud and undue influence, the state of mind of the testator is of the essence of the inquiry. In those cases the claim is of *external forces*, made unlawfully to operate upon the testator and to induce or coerce his *admitted act*.

In the one case the *act* is the subject of inquiry and the motive or inducement is immaterial.

In the other, the *motive* or *inducement* is the subject of inquiry and the *act*, being admitted, is immaterial.

Moreover, in cases of fraud and undue influence, the susceptibility of the party to the imposition of fraud or undue influence and his surroundings at the time are of the highest materiality, and to show these, his acts and declarations, his situation in life and all his surrounding conditions and circumstances are direct and original evidence of the highest value and the only evidence of which the nature of the case admits.

If the jury are to hear evidence of acts and declarations for the purpose of determining the testator's state of mind and probable intentions, and to find therefrom that he did not execute the paper because its provisions are not consistent with such evidence, how can the execution of a will, designedly made at variance with public acts and declarations and based upon purely private motives, be maintained?

The distinction between the two cases is well shown in the case of Boylan *vs.* Meeker and other cases cited *supra*, no one of which, however, is examined, considered or discussed in the opinion of the Court of Appeals or in Hoppe *vs.* Beyers, upon which that opinion is based.

With reference to this same subject the Court of Appeals refers to four cases as holding the declarations of the testator as suppletory to direct proof of fraud and undue influence, admissible "upon very slight foundation of the direct proof first required" (Rec. p. 158).

Without noticing the irrelevancy of such cases to the question under discussion, it may properly be said that in two of the cases cited, (Stephenson *vs.* Stephenson, 62 Iowa, 163, and Parsons *vs.* Parsons, 66 Iowa, 754), the reports do not show what evidence was offered as a foundation, and there is no means therefore of judging whether the foundation was strong or slight, but it does appear that the issue of *mental capacity* was presented in each case, which alone would have justified the admission of the declarations. In the other two

cases (Lane *vs.* Moore, 151 Mass. 87, and Woodbury *vs.* Woodbury, 141 Mass. 329) it is submitted that the strongest kind of a foundation was laid. Both were cases of gifts *inter vivos*, by donors over eighty years of age, feeble in body and mind, and the donees were their confidential agents and advisors (in one case, physician as well). In these cases therefore, the gifts were, from the facts, *prima facie* fraudulent in law, and the burden was on the donees to show the contrary. It can hardly be said that such cases present "slight foundation of the direct proof" of undue influence.

The Court of Appeals instances the cases of the Will of Cottrell, 95 N. Y. 329; Beadles *vs.* Alexander, 9 Baxter, 604, and Adams *vs.* Norris, 23 How. 353, as sustaining the admission of declarations of the testator as suppletory proof of the formality of legal execution.

In the first case (Will of Cottrell, 95 N. Y.), the will was holographic, and the attestation clause was also in the handwriting of the testator.

The attesting witnesses denied their signatures, but experts testified that they were genuine. The case had been tried before the surrogate on the law and facts, and the Court of Appeals of New York expressly disclaims ruling upon the admissibility of evidence, saying (p. 333):

> "We look into the evidence given on the trial only for the purpose of seeing whether there is competent evidence to support the conclusions of fact found by the trial court."

The court shows that his findings are amply supported by the facts in evidence independently of any alleged declarations of the testator. What the declaration was does not clearly appear; the only thing in the report of the case on that subject being a brief reference in the opinion, where the court says (p. 337):

> "The testator declared during his last sickness that the will executed as he had described it was

> either among his papers or that he had given it to his executor."

The ground upon which the declaration was received, however, is clear. The court holds (p. 339) that evidence tending to show that the person superintending the execution of the will knew the requirements of law as to the formalities of due execution, is admissible to support the presumption of due compliance with law arising from an attestation clause asserting such compliance, and the declarations of the testator, together with the fact that he himself wrote the attestation clause, would, of course, tend to show such knowledge.

The case of Beadles *vs.* Alexander, 9 Baxter, has already been discussed (*supra*, p. 164). The declaration in that case was purely a narrative of a past event, and as such was the plainest hearsay.

The case of Adams *vs.* Norris, 23 How., was an ejectment suit brought to this court by writ of error to the Circuit Court for the District of California, and the question was as to the valid execution of a codicil under the Spanish law and local customs as in force in California at the time (1845).

As appears from the opinion by Mr. Justice Campbell, the codicil was in the Spanish language (p. 356), and the genuineness of the signatures of the testator and of the witnesses was established "by the admission of the plaintiff" (p. 357).

The declaration of the testator put in evidence was that shortly before his death the testator had—

> "informed a witness that he had devised his place of del Paso, with the stock on it, to Hiram Grimes, his nephew" (p. 357)—

which correctly stated the substance of the codicil.

It does not appear that this declaration was objected to, but it was plainly admissible as showing the testator's

knowledge of the existence and contents of the codicil; in view of its being in the Spanish language, this was especially material, it not appearing that the testator, who was a naturalized Mexican, understood that language.

The ground of its competency is thus stated by Mr. Justice Campbell (p. 368):

> "As suppletory proof that the testator had made the codicil, and was acquainted with the contents of the instrument, the admission or declaration offered as evidence was competent testimony."

Thus it will be seen there is nothing in any one of these cases which throws any light upon the question of the admissibility of evidence tending to show the state of mind, feelings or intentions of the testator to disprove the act of execution; but in each of the cases the declarations admitted tended to show knowledge on the part of the testator of the existence and contents of the instrument, and therefore to identify it as his act.

Upon the whole, therefore, it is submitted, that a careful analysis of the opinion of the Court of Appeals on this branch of the case shows that opinion to be without other support than the case of Hoppe *vs.* Beyers, itself wholly unsupported and opposed to all authoritative decisions on the subject; and further, that the reasons advanced by the Court of Appeals for the affirmance of the judgment below are unsound, and such as ought not to receive the sanction of this court.

This concludes the discussion of the two principal question which, as was stated at the opening of this brief, had never before been presented in this court, and the correct decision of which is of such far-reaching consequence, and leads to the consideration of the errors assigned as to the other rulings at the trial.

Evidence of Opinions Based on the Style and Composition of the Paper in Controversy and the Etiquette to be Observed by Judge Holt Toward his Superior Officers.

The rulings of the court embraced under this head, covered by the ninth, tenth and twelfth assignments of error, relate to the admission in evidence of opinions of witnesses upon matters which, it is submitted, are not the proper subject of opinion testimony, followed by the exclusion of similar evidence offered in rebuttal, and the instruction to the jury in regard to the same.

In support of the claim of forgery counsel for the caveators offered the testimony of Colonel Barr as to the legal attainments of Judge Holt and his grammatical and rhetorical style of composition, to the effect that Holt was the finest rhetorician witness ever saw; that witness had the highest respect for Holt's abilities as a lawyer and that Holt undoubtededly knew that the term "inherit" did not apply to a person taking under a will (Rec., p. 29). The witness was also asked and permitted to testify as to his opinion of Holt's manner towards men in such situations as General Grant and General Sherman, for the purpose of showing that it was improbable he would have asked persons in their positions to witness his will, because it would have been an impropriety for him to do so if he entertained a proper sense of what was due to his superior officers; the witness in this connection describing Holt as a man of retiring modesty. The court permitted this testimony to be given as proof of forgery under the explanation and for the purpose indicated by counsel for the caveators as above stated (Rec., pp. 30–31).

The court also admitted in evidence under this issue the testimony of Mrs. Briggs, to the effect that in her opinion the will in controversy was not written by Judge Holt, both because of the writing and of the style of composition, in fact "more the composition" (Rec., pp. 40–42). And she

was permitted generally to describe his grammatical and rhetorical style of composition, as competent evidence on the issue of forgery (Rec., p. 42).

The court also admitted in evidence as competent to prove forgery, the testimony of William Winthrop, who had practiced law from 1854 to 1861, as to the witness' opinion of Holt's ability as a lawyer, and as to Holt's grammatical and rhetorical style and permitted him to express his opinion, based upon "the handwriting and the composition, style, and punctuation of the whole paper," that Holt was not "the producer of that document" (Rec., p. 43), and also that from his "knowledge of Gen. Holt's characteristics and his way of expressing himself," he would not have used the word "inherit" in the sense it is used in the will in controversy (Rec., p. 44).

It is to be observed that Mrs. Briggs was not a lawyer nor did she pretend to any familiarity with or knowledge of the style of composition appropriate to testamentary papers in general, nor to any knowledge whatsoever as to Holt's "style" in such matters, if, indeed, he had any, and of which we have a somewhat astounding example in the Record (Rec., pp. 44–47).

Mr. Winthrop, though a lawyer, does not pretend to a familiarity with Holt's "style" in respect to writing testaments, and it is safe to surmise he would have given different testimony had he seen many such examples as the will of 1848 to which reference is above made.

Indeed, an examination of the "style" and "composition" and legal training exhibited by that document suggests that Judge Holt might have truly said with Suffolk in Henry VI (Pt. 1, Act II, Scene 4):

> "Faith, I have been a truant in the law,
> And never yet could frame my will to it;
> And, therefore, frame the law unto my will."

It is submitted that in this evidence the caveators created

an entirely new field of expert or opinion testimony, not before recognized by the courts, and it is not surprising that untried and inexperienced persons were recruited for the purpose.

Striking illustrations of the impropriety of such testimony is found in the evidence of these witnesses. For instance, as to the word "inherit" it was necessary for the witnesses first to assume that the use of the word was improper, and then to assume that Holt so considered it, and for that reason would not have used it. Yet the use of the word "inherit" as employed in this will is not so clearly open to condemnation as counsel and witnesses seem to assume. It is not an Anglo-Saxon word, belonging to the language of the common law, but is from the old French "*enheriter*," belonging to the language of the civil law, and the ordinary signification of the word is not confined by lexicographers to taking by descent (see Worcester's, Webster's and the Century Dictionaries), while the word "inheritance," as used in the civil law, is thus defined by Bouvier:

> "The succession to *all* the rights of the deceased. It is of two kinds: *that which arises by testament when the testator gives his succession to a particular person*; and that which arises by operation of law, which is called succession *ab intestat*."
>
> See to the same effect Black's Law Dictionary—Tit. "Inheritance."

That the sense in which this word is used in the will in controversy is by no means unusual appears from a recent case, Shapleigh *vs.* Shapleigh, 44 Atl. 107 (July 28, 1899) [not yet officially reported], where the Supreme Court of Vermont construed a will containing the following clause:

> "Sixth. I give and bequeath to Marion T Shapleigh, widow of my deceased brother, Fred. R. Shapleigh, the proportion coming to me as heir of said Fred. R. Shapleigh in his estate."

The testator was a legatee and devisee of Fred., and also his executor.

Chase, J., for the court says (p. 108):

> "He [the testator], must have used the word 'heir' not in its technical but *in its most general sense*, as indicating the person upon whom property devolves on the death of another, either by law or by will. Cent. Dict."

It cannot therefore be said to be so glaringly bad an expression as used in the will, especially as Judge Holt's duties as Judge Advocate General and Chief of the Bureau of Military Justice would certainly have tended to keep him in touch more with the civil, than the common law.

In addition to this illustration the Record discloses one of these experts (Mrs. Briggs) declaring Holt's "style" to be a model of terseness—"Never a word that the sentence could be made complete without"—(Rec., p. 42), and another (Mr. Winthrop), alliteratively telling the jury it was "formal, florid and flowery" (Rec., p. 44), and that he "used no superfluous words but illustrated a good deal," while the third (Colonel Barr) makes him "the finest rhetorician," given to "using a full share of commas" (Rec., p. 29).

Counsel have been able to find but one case in which a witness was asked for his opinion based upon the style of composition of a writing, where its authorship was in issue, and in that case the Court of Appeals of New York held such a matter not to be a proper subject of opinion testimony.

In Lee *vs.* Bennett, Howard's App. Cas. 187 (1847), one Lee sought to recover from the defendant, the proprietor of the "New York Herald," the value of services he claimed to have performed as reporter. The plaintiff alleged that a certain report of a trial which was published in defendant's newspaper had been written by him, and, in support of his authorship of the report in question, produced as a witness a newspaper reporter, who was shown a printed copy of the

article, and was asked, "From that printed copy can you state whose reports they were?" This was objected to and the objection sustained (pp. 188–9) and judgment was rendered for the defendant.

The judgment was removed into the Superior Court by *certiorari*, and was there reversed, that court holding this evidence to have been competent (pp. 191, 194–5). A writ of error was sued out, bringing it to the Supreme Court, which reversed the judgment of the Superior Court and held the question to have been improper (p. 191), and that judgment was finally affirmed by the Court of Appeals (p. 202).

Seven of the eight judges held evidence of the opinion of the witness based on the style of the paper to be inadmissible, Jewett, C. J., delivering the opinion, which is not reported.

The reporter's note at the end of the case, summarizing the opinion of the chief justice, reads in part (p. 202):

> "The rule which requires witnesses to testify to facts from knowledge and not from belief justified the decision of the justice in excluding the question put to the witness Doyle, to wit: 'From that printed copy can you state whose reports they are?' There are exceptions to this rule. On questions of skill and judgment, men of science and experience are allowed to give their opinion in evidence [Lincoln *vs.* RR. Co.], (23 Wend. 425). But this does not come within any exceptions to the rule."

See particularly the argument of Messrs. Galbraith and Edward Sandford for defendant (pp. 195–197), in which they say this is the first time such evidence has ever been offered.

> See, also, Lawson on Expert and Opinion Evidence (1883), 167.

It is not easy to imagine where, if ever, litigation would end, were it once established that this realm of investigation is proper upon an issue of forgery. Certain it is that

few men would have the genius to combine in their testamentary papers all the vagaries of "style" attributed to them by all their acquaintances, yet if the evidence in the Record in this case be competent, such would seem to be necessary to insure the validity of their wills.

The peculiar official relations of the testator with the witnesses to the paper propounded, it is submitted, were not matters which justified the introduction of opinion testimony as to what might have been the proprieties or whether or not Judge Holt was a man who would have observed a particular standard of propriety.

In the case of Spence *vs.* Spence, 4 Watts. (Pa.) 165 (1835), an inquiry as to the relations of the testator with one of the subscribing witnesses to his will where fraud and conspiracy on the part of that witness was charged, was excluded by Chief Justice Gibson.

In that case, on an issue of *devisavit vel non*, defendant proposed to prove that testator disliked one of the subscribing witnesses. This was objected to and the objection sustained.

On appeal this ruling was affirmed, Gibson, C. J., delivering the opinion, saying (p. 166):

> "The relevancy of the fact is not perceived. The witness had pretended to no intimacy with the testator; but had testified that, happening to be on the spot, he was requested by him, in the urgency of his approaching dissolution, to correct certain blunders of the scrivener in respect to names; and that his corrections were supervised by the testator, who re-examined the paper before he signed it. Such an agency is consistent with want of confidence in the agent; and as the evidence neither contradicted the witness nor indicated the supposed confederacy it was properly excluded."

Ramadge *vs.* Ryan, 9 Bingham, 333 (1832), was an action of libel against the editor of a journal, in which had ap-

peared an article stating that a certain reputable physician had refused to enter into consultation with the plaintiff, also a physician, and that in so doing he had "honorably and faithfully discharged his duty to his medical brethren." On the trial defendant's counsel proposed to call an eminent surgeon, and ask him whether he would meet the plaintiff in consultation, and also whether in refusing to consult with the plaintiff, the physician, whose conduct was commented upon in the article in question, had faithfully discharged his duty to the medical profession. The Chief Justice (Tindal) held such evidence inadmissible, and the jury returned a verdict for the plaintiff.

On a motion for a new trial, it was contended that this testimony should have been received (p. 335)—

> "upon the same principle as the opinion of scientific men on matters of science . . . because the jury must be ignorant of the conventional rules and etiquette established in each profession, which can only be known, or only accurately known, by members of such profession."

Tindal, C. J., in refusing to grant a new trial, says (p. 335):

> "Witnesses skilled in any art or science may be called to say what, in their judgment, would be the result of certain facts submitted to their consideration; but not to give an opinion on things with which a jury may be supposed to be equally well acquainted. If in this case any specific rules of the medical profession had been given in evidence, the defendant perhaps might have been allowed to show that the plaintiff, by violating those rules, had rendered himself unworthy of the countenance of his brethren. But the question here was, whether a physician, in refusing to consult with the plaintiff, had honorably and faithfully discharged his duty to the medical profession. The answer to that might depend altogether on the temper and peculiar opinions of the individual witness, and was a point on which the jury were as capable of forming a judg-

ment as the witness himself. On this ground, therefore, there is no reason for granting a rule for a new trial."

This court has announced the same doctrine in Milwaukee and Saint Paul R.R. Co. *vs.* Kellogg, 94 U. S. 469, where Mr. Justice Strong says (p. 472):

"A second exception taken in the court below, and here insisted upon, is that the court refused to permit the defendants to prove by witnesses who were experts, experienced in the business of fire insurance, and accustomed by their profession to estimating and calculating the hazard and exposures to fire from one building to another, and to fixing rates of insurance, that, owing to the distance between the elevator and the mill, and the distance between the elevator and the lumber piles, the elevator would not be considered as an exposure to the mill or lumber and would not be considered in fixing a rate thereon, or in measuring the hazard of mill or lumber.

"This exception is quite unsustainable. The subject of proposed inquiry was a matter of common observation, upon which the lay or uneducated mind is capable of forming a judgment. In regard to such matters, experts are not permitted to state their conclusions. In questions of science their opinions are received, for in such questions scientific men have superior knowledge, and generally think alike. Not so in matters of common knowledge. Thus, it has been held that an expert cannot be asked whether the time during which a railroad train stopped was sufficient to enable the passengers to get off, Keller *vs.* Railroad Company, 2 Abb. (N. Y.) App. Dec. 480; or whether it was prudent to blow whistle at a particular time, Hill *vs.* Railroad Company, 55 Me. 438. Nor can a person conversant with real estate be asked respecting the peculiar liability of unoccupied buildings to fire. Muloy *vs.* Insurance Company, 2 Gray (Mass.), 541. In Durell *vs.* Bederly, Chief Justice Gibbs said: 'The opinion of the underwriters on the materiality of facts, and the effect they would have had upon the premium,

> is not admissible in evidence.' Powell's Evid. (4th Ed.) 103. And in Campbell *vs.* Richards, 5 Barn. & Ad. 846, Lord Denman said: 'Witnesses are not receivable to state their views *on matters of legal or moral obligation nor on the manner in which others would probably be influenced, if the parties had acted in one way rather than in another.*' See, also, Lord Mansfield's opinion in Carter *vs.* Boehm, 3 Burr. 1905, 1913, 1914, and Norman *vs.* Higgins, 107 Mass. 494, in which it was ruled, that, in an action for kindling a fire on the defendant's land so negligently that it spread to the plaintiff's land and burned his timber, the opinion of a person experienced in clearing land by fire, that there was no probability that a fire set under the circumstances described by the witnesses would have spread to the plaintiff's land was inadmissible."

Both the question of style and that of etiquette were in the nature of matters of "common observation," and the jury, with the necessary facts before them, were quite as competent to form opinions thereon as could be any other person—indeed, as to the style and composition of the will in controversy, far better qualified, having before them two admittedly genuine wills drawn by Judge Holt, than any of the witnesses who testified as to their opinions, none of whom claimed to have seen an example of Judge Holt's testamentary style.

The error committed in admitting this testimony is emphasized and the injury done the caveatees was aggravated by the peculiar and extraordinary rulings of the trial court with reference to this class of evidence at different stages of of the trial.

Upon the cross-examination of the Hon. Robert R. Hitt, a witness produced by the caveatees in their case in chief, the caveators asked that witness whether, upon looking at the phraseology of the will in controversy, he found "there any of the characteristics of Judge Holt in the composition of that paper" (Rec., p. 26). This was objected to

by the caveatees, and after full argument (Rec., pp. 26–28), the court sustained the objection. Immediately upon this ruling the caveatees closed their case (Rec., p. 28). Subsequently, upon the examination of Mrs. Briggs, produced by the caveators in their case in chief, the witness was asked about Judge Holt's style of composition. This was objected to, and, at the court's suggestion, the matter was re-argued (Rec. p. 41), and the court changed its ruling (Rec. p. 42) and admitted her evidence on this subject, and also that of Colonel Barr and Colonel Winthrop, as above noted. Upon the close of the caveators' case the caveatees produced John A. Bingham and attempted to rebut this evidence introduced by the caveators, whereupon objection was promptly made by the caveators and the evidence was excluded by the court *on the ground that it should have been offered in chief* (Rec., pp. 104–108).

The caveatees were prohibited from introducing this evidence in chief, had they desired to do so, by the ruling then made, and when, subsequently, they sought to rebut the evidence introduced by the caveators under the changed ruling of the court, they were again prohibited and told they should have offered it at the time the court originally held it inadmissible.

Counsel for the caveators afterwards seemed to recognize the inadmissibility of evidence of opinions based upon the style of composition, and, at the close of the trial, requested the court to instruct the jury to disregard them.

The Error in Admitting Opinion Evidence Was Not Cured by the Subsequent Instruction to Disregard.

It is conceded that, where, in the course of a trial, illegal evidence has been admitted and the court subsequently recognizes that fact and withdraws such evidence from the consideration of the jury, as a general rule, the error originally committed is cured. This is established by many au-

thorities in this court, which, however, recognize exceptions to the rule in those cases where the incompetent evidence, from its nature or the manner of its submission, has so affected the jury that that its injurious consequences can not certainly be removed by the subsequent action of the court. This case, it is claimed, comes within such exception to the general rule.

The evidence of the opinions of witnesses founded upon Judge Holt's style and composition was placed before the jury early in the trial (Rec., pp. 40–42). After the question of its admissibility had been twice elaborately argued (Rec., pp. 26–28, 40–42), at a subsequent stage of the trial, this matter was again brought to the attention of the jury upon the caveatees offering to rebut the testimony admitted (Rec., pp. 104–107), and was again fully argued. It will thus be seen that the subject was given great prominence during the course of the trial, was earnestly insisted upon by counsel for the caveators and earnestly opposed on behalf of the caveatees. The jury were, therefore, in effect, advised that this matter was one of great importance and this testimony must have made a correspondingly deep impression on their minds. The trial lasted five weeks—from May 18 to June 25, 1896—and during most of this time the jury had before them, strongly and repeatedly impressed upon their minds, this incompetent evidence. When the case was finally closed, the caveators, recognizing the inadmissibility of this evidence, sought to relieve themselves from the responsibility for its introduction, and, in their eighth prayer (Rec., pp. 120-121), in effect requested the court to direct the jury to disregard any opinions as to whether Judge Holt wrote the will in controversy, based, in whole or in part, upon the composition of the paper or the expressions contained therein. This was granted, over objection and exception of the caveatees, and the court in its final charge when reading this prayer to the jury introduced it by saying (Rec., p. 130):

> "The court has granted, at the instance of the caveators, the prayer numbered eight, which I will read to you in this connection."

It will be observed that the jury were not told that this was illegal or incompetent evidence, not proper for their consideration, and that, therefore, it must be disregarded, but the remark of the court above quoted leaves open the inference that the trial justice regarded this evidence as competent, and only withdrew it from the jury as matter of grace and favor to the caveators. The manner of its withdrawal, then; the prominence given to this evidence throughout the trial; the earnestness with which its admissibility was pressed by counsel for the caveators; the fact that before its withdrawal the caveatees were not permitted to rebut it; and the length of time this evidence remained before the jury, all combined to make its impression upon their minds so strong, that, it is submitted, the error committed in admitting it was not cured by their being told to disregard it. In considering this question it must be remembered that the case was a close one, from its nature doubtful and difficult, and therefore one in which any erroneous ruling might be of the most vital consequence to either party.

This case, then, is far different from any of those in which this court has held the erroneous admission of evidence to have been cured by its subsequent withdrawal.

In Specht *vs.* Howard, 16 Wall. 564, the evidence was withdrawn during the course of the trial immediately after it had been admitted and before it could have had any influence upon the minds of the jury.

In Pennsylvania RR. Co. *vs.* Roy, 102 U. S. 451, the jury were clearly told the evidence was incompetent; and, furthermore, under the instructions of the court as to the measure of damages, the illegal evidence could not have influenced their verdict, for they were expressly told that they should assess damages on the basis of the decrease of the plaintiff's

earning capacity and not upon the basis of his former or present pecuniary condition.

In Hopt *vs.* Utah, 120 U. S. 430, the evidence was stricken out directly after it had been admitted, and the jury were unqualifiedly directed that "they were not to consider it at all."

In N. Y., L. E. & W. RR. Co. *vs.* Madison, 123 U. S. 524, the court not only twice directed the jury to disregard the evidence, but in most unqualified terms told them it had been "improperly admitted."

In Texas & Pacific Rwy. Co. *vs.* Volk, 151 U. S. 73, incompetent evidence was admitted in support of a claim for exemplary damages. The jury were directed that they could not find exemplary damages, and by their verdict expressly assessed actual damages. All testimony in support of the claim for exemplary damages thus became wholly immaterial, and any error committed in its admission was cured by the verdict.

The distinction between all these cases and the one at bar is plain. This case, it is confidently submitted, falls within the exception instanced by Mr. Justice Field in Hopt *vs.* Utah, *supra*, where such an impression has been made upon the minds of the jury by illegal and improper testimony that "its subsequent withdrawal will not remove the effect caused by its admission;" and, therefore, the original objection must prevail on this writ of error.

As instancing the exceptions to this rule, the following cases are cited.

In Washington Gas Light Company *vs.* Lansden, 172 U. S. 534, as in the case of the Texas & Pacific Rwy. *vs.* Volk, *supra*, the evidence was only admitted in support of the claim for punitive damages, the court, however, having failed to direct the jury specifically that the testimony was incompetent, it was held that the original error in admitting it was not cured by the mere instruction to the jury that punitive damages could not be awarded.

Waldron *vs.* Waldron, 156 U. S. 361 (1894), was an action by a wife for damages for the alienation of her husband's affections. On the trial plaintiff attempted to introduce the record of previous divorce proceedings between herself and her former husband for the general purposes of the case. The court, however, admitted this record only to prove the fact of the divorce, and "repeatedly declared that it could only be used for that one purpose" (p. 364). Plaintiff's counsel, however, in their closing argument disregarded the rulings of the court with reference to the purpose for which the record of the divorce proceedings had been admitted.

In its final charge after the conclusion of the arguments to the jury the court again clearly and specifically instructed the jury as to the purpose for which the record of these divorce proceedings had been admitted, and directed them to limit their consideration thereof solely to the point it was to prove, namely, the fact of a decree of divorce having been granted.

Mr. Justice White, speaking for the court, says (pp. 382–383):

> "We come now to the last contention, which is this, that, conceding misuse was made of the record and other evidence, yet, as the misuse was corrected by the final charge of the court, therefore the error was cured. Undoubtedly it is not only the right but the duty of a court to correct an error arising from the erroneous admission of evidence when the error is discovered, and when such correction is made, it is equally clear that, as a general rule, the cause of reversal is thereby removed. State *vs.* May, 4 Dev. (Law), 330; Goodnow *vs.* Hill, 125 Mass. 587, 589; Smith *vs.* Whitman, 6 Allen, 562; Hawes *vs.* Gustin, 2 Allen, 402, 406; Dillin *vs.* People, 8 Michigan, 357, 369; Specht *vs.* Howard, 16 Wall. 564. There is an exception, however, to this general rule, by virtue of which the curative effect of the correction, in any particular instance, depends upon whether or not, considering the whole case and its particular circumstances, the error committed appears to have been of so serious a nature that it

must have affected the minds of the jury despite the correction by the court."

He then quotes from Hopt *vs.* Utah, 120 U. S. 438, and continues: "The case here, we think, comes within the exception."

In that case, then, the court not only limited the purposes for which the record of the divorce was admitted, but in the course of the trial "repeatedly declared that it could only be used for that one purpose," and, in its final charge again specifically pointed this out. And here, in spite of all these instructions by the trial court, most clear and positive, this court held the original error not to have been cured, that the effect of the evidence on the minds of the jury was not removed by the instruction to disregard, and that the case fell within the exception indicated in Hopt vs. Utah.

In Erben *vs.* Lorillard, 19 N. Y. 299 (1859), Denio, J., says (p. 303):

> "The judge at the trial allowed the plaintiff to give evidence of the value of the lease, which the defendant agreed to give him, overruling, at the time the defendant's objection to the evidence; but he reconsidered this ruling when he came to charge the jury, and instructed them to disregard the proof respecting the lease, and give the plaintiff only the actual value of the services. But if the first decision was wrong, the error was not cured by the subsequent direction."

Grover, J., speaking of the effect of this evidence, says (p. 302):

> "The plaintiff's counsel insists that this (if error) was cured by the charge. When illegal evidence, properly excepted to, has been received during a trial, it must be shown that the verdict was not affected by it, or the judgment will be reversed. If the evidence may have affected the verdict, the error can not be disregarded. The rights of parties can

only be preserved by adhering to this rule. It would be vain to observe the rules prescribed by law to secure an impartial jury, if their minds are to be subjected to the influence of illegal evidence after they are impaneled. It does not follow that impressions thus obtained will have no effect, although the judge directs them to disregard the evidence. A juror is never made competent by the direction of the judge to disregard any opinion he had formed previous to taking his seat. Such direction has never been thought sufficient to protect a party from its effect. An opinion derived from illegal evidence upon the trial would be equally prejudicial. The judgment should be reversed."

O'Sullivan *vs.* Roberts, 39 N. Y. Superior, 360 (1875), was an action to recover for services in going to Mexico at the defendant's request. On the trial, the plaintiff stated he was taken ill in Mexico, and was then asked what expense he was put to by his illness. The court permitted him to answer over defendant's objection. The case was heard before Sedgwick and Speir, JJ., the latter delivering the opinion, both concurring. He says (p. 370):

"I am of opinion that this testimony was clearly inadmissible. Under any aspect of the case was it proper? No obligation whatever obliged the defendant to pay the expenses of the plaintiff's sickness at Orizaba, and the answer was calculated to awaken the sympathies and arouse the prejudices of the jury. Plaintiff's counsel contend that the error was cured by the court directing the jury to disregard this testimony and ordered it to be stricken out. *But the testimony was given at the commencement of the trial, which lasted three or four days, and the order to disregard it and strike out was at the close, when the judge charged.*

"The evidence had already had its effect upon the jury, and we cannot say their jugments were not influenced. The cases of Anderson *vs.* The Rome, W. & O. RR. Co., 54 N. Y. 334, and Erben *vs.* Lorillard,

19 N. Y. 302, are clearly against the admission of this testimony."

In Furst *vs.* Railroad Co., 72 N. Y. 542 (1878), an action for personal injuries sustained by being run over by one of defendant's cars, the plaintiff introduced evidence to show that the conductor had made certain statements to the witness, after the time of the accident. Rapallo, J., for the court says (p. 546):

"After repeated objections to the questions put to the witness Furst had been made and overruled, he answered that the conductor told him that he thought the driver did not look, or the child would not have been run over. The plaintiff's counsel then proposed to have the answer stricken out, it appearing from the answer that it was merely matter of opinion. The defendant's counsel declined to accept this proposition, and elected to retain his exception. The court made no ruling and gave no instruction to the jury on the subject. The former rulings, the exceptions thereto and the objectionable testimony all remain in the case.

"The defendant's counsel had the legal right after the evidence had been admitted, in spite of his repeated objections, to insist upon his exception, and it was not his duty to waive it, as he would have done by accepting the proposal of the plaintiff's counsel. So far as the jury might be influenced by the incompetent evidence, the mischief was already done, and would not have been repaired by the agreement of counsel to strike it out."

. . . . . .

(P. 547). "The questions asked of the witness were manifestly improper in any point of view, the objections were repeated every time they were changed in form, and when at last the answer was drawn out, the counsel had a valid exception.

. . . . . .

"It having been got into the case in spite of these efforts, the counsel would have been remiss in his duty to his clients, if he had consented to waive his

> exception, under such circumstances that the mischief would not be fully repaired. The offer of the plaintiff's counsel, if accepted, would not have caused the jury to overlook this evidence, when they came to consider the case, and it is impossible to say that it did not have some influence upon them."

Certainly one party to a litigation should not be permitted to trifle with the rights of his adversary in this way. He has the right to insist upon the admission or exclusion of evidence, according to his judgment as to its competency, but his adversary has the correlative right to have the mischief corrected if the ruling be erroneous, and to permit such a course as was pursued in this case, it is submitted with all respect to the court and counsel, would be to establish a precedent for a very unjust procedure in trials.

The Ruling of the Court of Appeals on the Opinion Testimony.

The opinion of the Court of Appeals upon this subject (Rec., pp. 159–160) in effect holds: First, that the order of the introduction of evidence having been discretionary with the trial court, the exercise of this discretion in rejecting Colonel Bingham's evidence offered in rebuttal should not be disturbed; and, secondly, if there was error in the admission of the opinion evidence, such error was cured by the subsequent instruction to the jury to disregard it, for the reason that the state of facts in this case does not come within the exception to the general rule above noticed.

The court refrains from deciding whether or not the evidence of the opinions of the witnesses based upon the style and composition of the paper was admissible, confining its decision solely to the ground that the conditions of this case were not such as to bring it within the exception indicated in Hopt *vs.* Utah and Waldron *vs.* Waldron, *supra.*

Speaking of the evidence of Colonel Bingham offered in rebuttal, the Court of Appeals says (Rec., p. 160):

> "It will be remembered that when caveatees first closed their case they were admonished by the court that the rule in respect of rebuttal evidence would be rigidly enforced; and that they thereupon withdrew the announcement and examined a number of witnesses whose opinions were that the will and signature of testator were genuine. *It does not appear that there was any reason why this witness could not have been called on the matter of handwriting, simply, in the opening.*"

There was no reason why Colonel Bingham could not have been called to testify to the handwriting of the paper when the caveatees were making out their case in chief. They established their *prima facie* case by calling several witnesses as to the handwriting of Judge Holt and of the subscribing witnesses. Colonel Bingham was not called to testify as to the handwriting simply, but as will be seen upon reference to the question asked him (Rec., p. 105), to which the caveators objected, it was sought to elicit his opinion from his knowledge of Judge Holt's handwriting, "manner of composition and general attainments," all taken together, whether the paper was written by Judge Holt or not. This was clearly responsive to the evidence of opinions introduced on behalf of the caveators notably that of Mrs. Briggs and Colonel Winthrop given when the court first changed its rulings (Rec., pp. 41–43), and was offered to rebut the same. The reason this evidence could not have been offered by the caveators in their case in chief and which seems to have escaped the notice of the Court of Appeals though plainly disclosed by the Record was that just before they closed their case the court ruled (Rec., p. 28) in connection with the testimony of Mr. Hitt that such evidence was "not a matter for an expression of opinion by an ordinary witness." It is somewhat remarkable that the Court of Appeals should have failed to note this fact which makes pointed and evident the disadvantage under which the caveatees labored in respect to this evidence.

The effect of the Court of Appeals decision, therefore, is to hold that the circumstances of this case are not such as to bring it within the exceptions to the general rule that an instruction to the jury to disregard incompetent evidence cures the error in admitting such evidence—a position which it is confidently submitted, is entirely erroneous.

THE QUESTIONS OF REBUTTAL EVIDENCE.

The Twelfth and Thirteenth Assignments of Error.

The caveators offered the testimony of John B. Randolph, who claimed to be familiar with the signature of General William T. Sherman, and expressed it as his opinion that General Sherman's signature on the will was "a passably good imitation" (Rec., p. 85); "that in his opinion the said signature to the will was not in the handwriting of General Sherman" (Rec., p. 86); "that in the genuine signature of General Sherman, in the long quirl to the capital T, the upper and lower line met; witness never saw one in which they did not meet, and he had seen thousands of them" (Rec., p. 86). The fact that the upper and lower line in the quirl to the letter "T," in this will, did not meet was one of the witness' reasons for thinking this signature a forgery (Rec., p. 86).

The caveatees offered the testimony of General Sherman's son, P. Tecumseh Sherman, in rebuttal, to show that the peculiarity in the letter "T" in the signature to this will, which Randolph thought indicated forgery and declared did not exist in the genuine signature, "was by no means an unusual feature in the signature of General Sherman, and that it is frequently, if not habitually, found in his signature" (Rec., p. 103). And they also offered the testimony of Mr. Sherman, in further rebuttal of Randolph, to show that certain other specified features of the signature of General Sherman to the will which Randolph gave as reasons

for his opinion that it was a forgery, were of frequent occurrence in the genuine signatures of General Sherman; but upon objection of the caveators that this should have been offered in chief, all this testimony was excluded (Rec., pp. 101–104).

These features of the signature of General Sherman had never been alluded to in the testimony before that of Randolph was introduced. Randolph was the only witness offered to impeach the genuineness of the signatures of General Grant and General Sherman.

It was very important, because, if the signatures of General Grant and General Sherman were believed by the jury to be genuine, that would undoubtedly have been sufficient to overcome all the adverse testimony of every character in the case, and to establish the genuineness of the will.

It was only upon Randolph's cross-examination that it was discovered upon what he based his opinion. When it was disclosed that he based his opinion upon certain specific things, it was then competent, and for the first time became material, to show that he was mistaken and that the genuine signatures contained the very features which led him to declare this one to be a forgery.

That this was proper rebuttal evidence is clear upon plain principles of fairness and common sense and is sustained by judicial authority.

In the case of Wentworth *vs.* Railroad Co., 143 Mass. 248 (1887), it became material to know whether a certain gas-jet had been lit on a particular evening. Two witnesses for defendant testified it was, but, on cross-examination, stated they had no particular memory of the night in question, but that it was the uniform custom for that burner to be lit every night. The plaintiff, over objection, showed by witnesses who visited the place, after the night in question, that this burner was often unlit.

Morton, C. J., affirms the ruling of the court below on this point, saying (p. 249):

> "It seems to us that the course of the defendant at the trial was such as to make the question whether there was such a uniform practice or custom a material one, at least to the extent that the plaintiff might be permitted to contradict the witnesses by showing that there was no such practice. The defendant introduces a witness who swears positively to an important fact. Upon full examination it turns out that he can swear to this fact only as an inference from the existence of another fact, namely, that of a practice always to light the gas-burner in question, which he alleges to be true. We think the plaintiff may be permitted to show that the fact of such practice, which is the source and basis of the knowledge of the witness, from which he infers the main fact does not exist and is not true, without violating the rights of the defendant. It tends to contradict the witness and to show that his testimony in chief is not to be relied on."

In the case of Com. *vs.* Leach, 156 Mass. 99 (1892), the defendant was charged with producing an abortion. The prosecution produced experts to show that no woman could introduce a "sea tangle tent" into her uterus, and the trial court excluded evidence offered on behalf of the defendant to prove by a witness that she, the witness, had introduced such an instrument into her own uterus. Allen, J., held the exclusion of this evidence to have been error, saying (p. 102):

> "Where the testimony to be met is the opinion of expert witnesses that it is impossible in the nature of things for a particular thing to be done it is not necessary to rely on expert opinions to the contrary if it can be shown as a matter of fact that the thing has been done."

Railway Co. *vs.* Falvey, 104 Ind. 409 (1885), was an action against a railroad company for damages for personal injuries sustained at the hands of the company. One of defendant's witnesses was asked how old he thought plaintiff was. He replied 23 to 25 years. On cross-examination he

was asked the age of a bystander, which he placed at 55. In rebuttal plaintiff called this bystander, who testified his age was 46.

Elliott, J., delivering the opinion, says (p. 423):

> "It was competent for the appellee to prove that Applegate's opinion was of little or no value, because of his incapacity to correctly judge of a person's age. . . . The testimony was not irrelevant."

He then quotes Steph. Ev., Art. 50, and says (p. 424):

> "The reason for this rule is that it is proper to test the capacity of the witness and to ascertain the reasonableness or establish the unreasonableness of his opinion. Folkes *vs.* Chadd, 3 Doug. 157."

In S. A. & A. P. Rwy. Co. *vs.* Robinson, 79 Tex. 608 (1891) which was an action for personal injuries caused by the wrecking of a train on appellant's road, Gaines, J., says (pp. 609–610):

> "Upon the trial which resulted in this appeal, the plaintiff, who is appellee here, in order to sustain the allegations of his petition, adduced evidence tending strongly to show that as a result of the injuries received in the accident, his sexual powers had been greatly impaired, if not destroyed. To meet this, the defendant introduced testimony to the effect that, a short time before the trial, he had been caught in the act of sexual intercourse with a woman not his wife. In order to rebut this testimony he offered to prove by a witness, who was his wife at the time of the accident, but who had subsequently been divorced, that before his injuries he had been a man of great sexual vigor, but that afterwards he was impotent. The testimony was objected to on behalf of defendant, upon the ground that, being cumulative upon the evidence introduced by plaintiff, in chief, the offer came too late. The testimony was admitted and in its admission there was no error."

So, also, Gillett in his work on Indirect and Collateral Evidence says (Sec. 61):

> "While, as we have already seen, it is not competent for the party calling an expert to show by him particular instances in his own experience confirming, or tending to confirm, the opinion he has expressed, for the reason that such evidence would be collateral, yet the opposite party may introduce evidence of particular instances opposed to such opinion, for the reason that such evidence tends to overthrow the opinion."

Counsel are unable to reconcile this ruling of the court with that embraced in the twenty-fourth exception covered by the thirteenth assignment of error by which the caveators were permitted to offer the testimony of Martha Scott in surrebuttal (Rec., pp. 118–119).

Martha Scott had testified (Rec., p. 84), that Miss Throckmorton *never* went to Judge Holt's house "on any occasion accompanied by a white servant named Anna Tulley, *nor by any other person whomsoever.*"

In rebuttal Anna Tulley testified (Rec., p. 88), that she had twice accompanied Miss Throckmorton to Judge Holt's residence in 1891, and on these occasions saw this colored servant girl who admitted them.

In surrebuttal the caveators were permitted to recall Martha Scott (Rec., pp. 118–119) again to deny that Anna Tulley had been there with Miss Throckmorton, the ground of admitting her evidence being, that Anna Tulley was not in court when Martha Scott first testified, although in her previous testimony she had not simply denied that Miss Throckmorton had called in company with Anna Tulley, but that she had ever called accompanied by "*any other person whomsoever.*"

While ordinarily the order in which evidence shall be introduced upon a trial is within the discretion of the trial court, yet, where that discretion is so exercised as altogether to

cut off one of the parties to the litigation from introducing evidence, competent and proper in itself, such a ruling becomes reversible error. So, here the caveatees could not, without omniscience have anticipated every possible question that could be raised as to the handwriting of each of the persons whose names appeared upon the paper in controversy. In their case in chief they produced witnesses to testify to the genuineness of the handwriting of the paper and the signatures thereto. When the witness Randolph specifically pointed out a peculiarity in the signature as the reason for his opinion that General Sherman's signature was a forgery, it for the first time became possible, and therefore material, for them to show that the basis of his opinion was fallacious. This they offered to do and the court denied them the right —a ruling in line with, and analogous to, that heretofore discussed in connection with the testimony of opinions based upon the style and composition of the paper. In so ruling the court made it impossible for the caveators to introduce evidence entirely competent and very material to their case —how material can not be said, for the weight of the evidence was for the jury—and in excluding the evidence, it is confidently submitted, an error was committed, for which, were it the only one in the Record, this case ought to be reversed.

The Opinion of the Court of Appeals on Rebuttal Evidence.

In considering this question, as in considering the question of the presumption to be attached to the paper in controversy from its mutilated condition, the Court of Appeals refrained from making a definite decision, that court saying (Rec., p. 162):

> "Whilst inclined to the opinion that the discretion of the court might well have been liberally exercised in favor of the admission of this evidence, we do not think that its exclusion, considering, too, the indirect and slight contradiction between it and the

> evidence of Randolph, was an error for which the judgment should be reversed."

The witness Randolph had not confined himself to the expression of opinion, but had given his reasons, testifying that, in his experience the upper line in the quirl of the "T" in General Sherman's signature touched the lower line; that he never saw a case in which they did not touch and he had seen thousands (Rec., p. 86). In order to rebut this evidence the caveatees proposed to show by Mr. Sherman (Rec., p. 103) that—

> "in the particular here mentioned, the return line of the curve or quirl, it was by no means an unusual feature in the signature of General Sherman, and that it is frequently, if not habitually, found in his signature."

This was the "slight contradiction" referred to by the Court of Appeals. That court in its opinion states that, had Randolph testified that the alleged peculiarity was invariable, or, had it been offered to prove by Mr. Sherman that the signatures examined by Randolph did not contain the alleged peculiarity, this would have been proper rebuttal testimony, but that, Randolph having stated that this peculiarity occurred in four out of five signatures examined by him his statement might have been quite true, and yet the same peculiarity might not have occurred in any of the signatures with which General Sherman's son was familiar.

It is not necessary, however, to be competent in rebuttal, that the evidence should tend directly to contradict some statement of fact by the witness. The fact affirmed by Randolph might be admitted, yet if it could be also shown that it was not a uniform peculiarity and that the feature of the signature found in the will which led the witness to condemn it, was one of frequent or habitual occurrence in genuine signatures, would it not have shown that Randolph's opinion rested upon a false basis?

The value of his opinion was the important feature of his testimony.

A good illustration of the principle is found in the testimony of Mr. Sherman with respect to his mother's signature. He testified to the genuineness of her signature to the will; but, on cross-examination, that she "*usually* wrote her name Ellen *Ewing* Sherman; but that it was her habit to sign all legal papers Ellen B. E. Sherman," as it appears on the will (Rec., p. 21).

If this fact had not been developed on his cross-examination, and a witness for the caveators had based an opinion against the genuineness of her signature on the fact that in all, or nearly all, the signatures he had examined she wrote her name Ellen Ewing Sherman, would it not have been clearly competent and important in rebuttal to show that as to legal papers she adopted a different mode of signature, and would not that tend utterly to destroy the value of an opinion based upon an ignorance of that fact?

A NEW TRIAL, IF GRANTED, SHOULD BE CONFINED TO THE ISSUE OF FORGERY.

It was pointed out, *supra*, p. 25, that, of the four issues in this case, the second and third, presenting the questions of fraud and undue influence in the procurement of the will, were abandoned by the caveators, no evidence whatever having been offered upon either of them, and that the court peremptorily instructed the jury to answer each of them in the negative. It has also been shown, *supra*, pp. 57-97, and, counsel confidently submit, been made matter of demonstration, that there was not one particle of competent evidence submitted to the jury upon the fourth issue, presenting the question of the revocation of the will propounded, although it was not abandoned and that the trial court committed error in refusing to instruct the jury to

answer this issue as well as the issues of fraud and undue influence in the negative.

It is submitted that, if this court shall reverse the judgment below and award a new trial, such new trial should by the judgment of this court, be confined to the single issue of forgery—the only issue in the case upon which any competent evidence was offered.

The issues of fraud and undue influence having been abandoned by the caveators, no evidence in support of either having been offered, the caveators have not now the right to reopen and retry those questions, which have no relation to the issues that were contested.

The verdict upon the second and third issues being correct and entirely independent of, and separable from, the verdict on the first and fourth issues, should not be disturbed.

If the view contended for by the plaintiffs in error as to the issue of revocation be sustained by this court, the verdict upon that issue would necessarily stand in the same situation as does the verdict upon the issues of fraud and undue influence. The fact that that issue was not answered by the jury simply "No," but had added to it, contrary to the practice in trials at law, the words "because he never executed it," does not render the verdict less conclusive of that issue. As heretofore pointed out these words were added by the jury to their finding on this issue by permission of the court at the suggestion of counsel for the caveators.

One of the apparent objects of this suggestion, as appears from the colloquy between court and counsel (Rec., p. 141) was that they might not be bound by the verdict in the event of a new trial. This was obviously inadmissible, as the verdict must be either conclusive or a nullity. A verdict can never be conditional; and it matters not upon what ground the jury render their verdict, if responsive to the issue, it is absolute and conclusive of the facts tried and of all facts which might have been tried under the issue presented. Having elected to try all these issues together, for

it was "upon the motion of the counsel for the caveators" (Rec., p. 12) that this was done, they were bound to submit to a final and conclusive verdict upon all of them.

There was no power in the court or jury to make the verdict on any of them conditional upon subsequent events. The addition, therefore, to the verdict of the words suggested by counsel can not have the effect of qualifying the verdict in any particular, and moreover, having obtained a verdict in their favor upon one issue, and against them on the other three, they elected to stand on the verdict as rendered and to take a judgment upon the one issue found in their favor, by which course they are now estopped to dispute the validity and finality of the verdict upon the other three issues.

The verdict in this case being the answer of the jury separately given to four separate and distinct issues, is not, as in ordinary actions at law, where a general verdict is rendered, an entire thing, but is severable, and in reality consists in four separate verdicts, and should be so treated.

Perhaps the most complete examination and discussion of this question to be found in the books is by the Supreme Court of New Hampshire, embracing an exhaustive review of all the decisions on the subject, in the case of Lisbon *vs.* Lyman, 49 N. H. 553–605 (1870).

The action was assumpsit for support of the pauper wife and children of Volney Clough, resulting in a verdict for plaintiff.

The question was whether Volney Clough had a settlement in Lyman by derivation from his father. The court found that all the questions in the case had been correctly submitted to the jury, except that the court erroneously instructed the jury that the burden of proving the assessment of taxes against Volney's father was upon the defendant, and for this the case is reversed (p. 582).

In disposing of the question Doe, J., for the court says (p. 582):

"Should the new trial be of that part of the case in the former trial of which there was error, *or of the whole case?*

"Several questions of fact have been tried and decided by the jury. In the trial of the question whether Isaac paid all taxes duly assessed, there was error; all the other questions were correctly tried. *Is the correct trial of all the other questions invalidated by the mistrial of a single question? Is the right decision of all the other questions nullified by the erroneous decision of one?* If the error had affected the trial and decision of two of the questions, to the prejudice of the defendant, it would be necessary to try those two again, in order to correct the error; if the error had affected four of them, it would be necessary to try four again; if it had affected all of them, it would be necessary to try them all again. But the error in the trial of the question whether Isaac paid all the taxes duly assessed, did not affect the trial of any of the other questions. And there is no practical difficulty in granting a new trial of the question that has been erroneously tried, without disturbing the verdict. If, on the new trial of that question, the verdict should be for the plaintiff, judgment could be rendered for the plaintiff, for the damages assessed in the first verdict; if the verdict should be for the defendant, judgment could be rendered for the defendant; in either case, the record of the judgment would recite all the proceedings that produced the result.

"The general principle of the correction of errors which occur in judicial proceedings, preserves, as far as possible, what is good, and destroys only what is erroneous when the latter can be severed from the former, and destroys no more of the good than is necessary in the process of rectification."

. . . . . .

(P. 583): "If substantial error in a judgment can be corrected without destroying the judgment, why should not error in a verdict be corrected without destroying the verdict? If the wrong parts of a judgment can be made right, without losing the

good parts, why is a verdict incapable of a similar rectification?

"The general principle of preserving the good, and destroying the bad, applies to the correction of errors in trials and verdicts, as well as to errors in judgments."

. . . . . .

(P. 584): "It is not unusual to direct the jury to find their verdict separately for different parts of the damages, so that, the parts being severable on the face of the verdict, an error may be cured by a *remittitur*. . . . The inquiry is into the practical separability of the substance of the verdict."

. . . . . .

(P. 585): "If there are several issues, and a verdict on all for either party, and an error in the trial of one of them, a new trial is not granted if the party having the verdict consents that a verdict be entered for the other party on the issue in the trial of which there was error. . . . The same rule applies to other proceedings. When an award is good in part, and bad in part, the valid part is sustained when it can be separated from the rest, and the justice of the case requires it, and the object of the submission can be accomplished."

Robbins *vs.* Townsend, 20 Pick. 345 (1838), was assumpsit brought by the plaintiff as master of the house of correction to recover for the support of a pauper. Verdict was rendered for plaintiff, and defendant moved for a new trial on the ground of misdirections of the judge in matters of law (p. 347).

Dewey, J., says (p. 351):

"But there having been a full and legal trial on the merits as to the other parts of the case, and the question of the appointment of the plaintiff as master of the house of correction being entirely disconnected with the other questions raised, and one which in no way could have had any influence upon the finding of the jury upon those questions, the new trial is

limited to this particular point. In cases like the present, substantial justice may be done without disturbing the verdict generally, by submitting to a new jury the question, in reference to which, evidence was erroneously admitted. Such a course has been sanctioned by this court, in the cases of Winn *vs.* Columbian Ins. Co., 12 Pick. 287; Sprague *vs.* Bailey, decided at October term, 1837, in Middlesex, and in several other cases within the recollection of the court. New trial ordered."

Amherst Bank *vs.* Root, 2 Met. 522 (1841), was an action of debt on a cashier's bond. Verdict was rendered for plaintiff, and defendants moved for a new trial on sundry exceptions. Only one exception was sustained, and, in remanding the case for a new trial, Shaw, C. J., for the court, says (p. 542):

"As the only exception, which is sustained, relates to the proof of the execution of the bond, the court are of opinion that this is one of those cases where the new trial should be confined to the point, whether the bond was duly executed, and that the issue to the jury on the new trial should be on that fact only. Winn *vs.* Columbian Ins. Co., 12 Pick. 279; Sprague *vs.* Bailey, 19 Pick. 442; Dyer *vs.* Rich, 1 Met. 192. If that fact is found for the plaintiffs, they will be entitled to a general verdict; otherwise a general verdict will be returned for the defendants."

In a more recent case in Massachusetts, presenting the exact phase of the question now before this court, growing out of findings by the jury upon several distinct issues to which separate answers were given, the same rule is applied.

The case is that of Codman *vs.* Dexter, 148 Mass. 421 (1889), and was a contest over a will and codicils. A number of issues were tried by the jury, among them the following:

2. Was Codman of sound mind at the time of making the will?

3. Was the will procured by fraud or undue influence?

6. Was he of sound mind at the time of making the first codicil?

7. Was the first codicil procured by undue influence?

9. Was he of sound mind at time of making second codicil?

The jury answered the second, sixth and ninth in the negative; the third and seventh in the affirmative.

The trial court, on motion for a new trial, set aside the verdict on the second and sixth issues and sustained the verdict on the third, seventh and ninth issues.

In disposing of the case on appeal, Knowlton, J., for the court, says (p. 423):

> "The only other question which has been argued before us is whether there was error in the refusal of the judge to set aside the findings of the jury on the third, seventh, and ninth issues. The third and seventh findings are that the will and first codicil, to which they respectively relate, were procured by undue influence and fraud, and the second and sixth findings are that the testator was not of sound mind at the time of making the will, and of making said codicil. The second and sixth findings were set aside, and the argument is, that the error of the jury in finding that the testator was of unsound mind at the time of executing each of these instruments must have entered into their findings, that he acted at the same time under undue influence, and that these findings should also have been set aside."
>
> . . . . . .
>
> (P. 424): "It is a mistaken assumption that the issues as to sanity and undue influence, in a case of this kind, are necessarily so connected that error in a finding upon one of them implies error in the finding upon the other. In many cases, perhaps in most, they are very closely connected. In some the connection is slight and unimportant. Where there is a close connection, sometimes it is such that an error in relation to the former would almost certainly involve an error in regard to the latter, while

an error in regard to the latter would not be likely to affect the finding upon the former.

. . . . . .

"How far the fact that a jury has gone astray in dealing with one issue shall be deemed important in considering a motion to set aside their finding upon another, must depend upon the relations of these issues to each other in the particular case, the evidence introduced upon each, and any facts and circumstances which throw light upon the nature or probable cause of the jury's mistake. And, finally, each issue is to be dealt with by itself, in view of the evidence, and of all that has occurred in the course of the proceedings.

"In the case at bar, we see nothing to indicate that the discretion of the court was improperly or unwisely exercised."

That there was no error in the instruction of the court upon the second and third issues is plain, for no evidence having been offered upon them, the jury could not possibly have found those issues in the affirmative. That upon the evidence offered and admitted on the issue of revocation, the same course should have been pursued with regard to that issue, seems equally clear. But whether so or not, the verdict thereon was also against the caveators, so that these three issues stand upon the same plane, and, the verdict being against the caveators on all three, and the issues being entirely disconnected, this court, in the event of granting a new trial, should by its judgment confine the new trial solely to the issue of forgery.

CONCLUSION.

It is finally respectfully submitted:

First. That the judgment in this case should be reversed and a new trial granted because of the errors in the admission

and exclusion of evidence and the instructions to the jury;

Second. That such new trial should be confined to the first issue, because there was no competent evidence offered in support of the second, third, and fourth issues, or any of them, and the verdict thereon is against the defendants in error; and

Third. That the addition to the verdict on the fourth issue of the words "because he never executed it," was unauthorized, is mere surplusage, and should be disregarded, and this court should so adjudge.

J. J. DARLINGTON,
CALDERON CARLISLE,
WILLIAM G. JOHNSON,
GEORGE C. FRASER,
Counsel for Plaintiffs in Error.